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REPORTS OF CASES

REPORTED BY

THE DISTRICT COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA.

C. P. POMEROY,

REPORTER.

VOLUME 1.

SAN FRANCISCO:
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DISTRICT COURTS OF APPEAL

FIRST APPELLATE DISTRICT.

RALPH C. HARRISON, Presiding Justice.

J. A. COOPER, Associate Justice.

S. P. HALL, Associate Justice.

SECOND APPELLATE DISTRICT.

WHEATON A. GRAY, Presiding Justice.

GEORGE H. SMITH, Associate Justice.

MATTHEW T. ALLEN, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.

A. J. BUCKLES, Associate Justice.

C. E. McLAUGHLIN, Associate Justice.

(III)

ORGANIZATION AND JURISDICTION OF DISTRICT COURTS OF APPEAL

[Constitution, Article VI, Section 4.]

Adopted, November 8, 1904.

The state is hereby divided into three appellate districts, in each of which there shall be a district court of appeal consisting of three justices. The first district shall embrace the following counties: San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Fresno, Santa Cruz, Monterey, and San Benito.

The second district shall embrace the following counties: Tulare, Kings, San Luis Obispo, Kern, Inyo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego.

The third district shall embrace the following counties: Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Mariposa, Madera, Merced, Tuolumne, Alpine, and Mono.

The supreme court, by orders entered in its minutes, may from time to time remove one or more counties from one appellate district to another, but no county not contiguous to another county of a district shall be added to such district.

Said district courts of appeal shall hold their regular sessions respectively at San Francisco, Los Angeles, and Sacramento, and they shall always be open for the transaction of business.

The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also, in all cases of forcible and unlawful entry and detainer (except such as arise in justices' courts), in proceedings in insolvency,

and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, and prohibition, usurpation of office, contesting elections and eminent domain, and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the supreme court); also, on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered. The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the district court of appeal of his district, or before any superior court within his district, or before any judge thereof.

The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within thirty days after such judgment shall have become final therein. The judgments of the district courts of appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced.

The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal of another district for hearing and decision.

The justices of the district courts of appeal shall be elected by the qualified electors within their respective districts at the general state elections at the times and places at which justices of the supreme court are elected. Their terms of

office and salaries shall be the same as those of justices of the supreme court, and their salaries shall be paid by the state. Upon the ratification by the people of this amendment the governor shall appoint nine persons to serve as justices of the district courts of appeal until the first Monday after the first day of January in the year nineteen hundred and seven, *provided*, that not more than six of said persons shall be members of the same political party. At the election in the year nineteen hundred and six nine of such justices shall be elected as above provided, and the justices of each district court of appeal shall so classify themselves by lot that one of them shall go out of office at the end of four years, one of them at the end of eight years, and one of them at the end of twelve years; an entry of such classification shall be made in the minutes of the court, signed by the three justices thereof, and a duplicate thereof filed in the office of the secretary of state. If any vacancy occur in the office of a justice of the district courts of appeal, the governor shall appoint a person to hold office until the election and qualification of a justice to fill the vacancy; such election shall take place at the next succeeding general state election as aforesaid; the justice then elected shall hold the office for the unexpired term.

One of the justices of each of the district courts of appeal shall be the presiding justice thereof, and as such shall be appointed or elected as the case may be. The presence of three justices shall be necessary for the transaction of any business by such court, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment.

Whenever any justice of the supreme court is for any reason disqualified or unable to act in a cause pending before it, the remaining justices may select one of the justices of a district court of appeal to act *pro tempore* in the place of the justice so disqualified or unable to act.

Whenever any justice of a district court of appeal is for any reason disqualified or unable to act in any cause pending before it, the supreme court may appoint a justice of the district court of appeal of another district, or a judge of a superior court who has not acted in the cause in the court below, to act *pro tempore* in the place of the justice so disqualified or unable to act.

viii ORGANIZATION ETC. OF DISTRICT COURTS OF APPEAL.

No appeal taken to the supreme court or to a district court of appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto.

All statutes now in force allowing, providing for, or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal so far as such statutes are not inconsistent with this article and until the legislature shall otherwise provide.

The supreme court shall make and adopt rules not inconsistent with law for the government of the supreme court and of the district courts of appeal and of the officers thereof, and for regulating the practice in said courts. [*Amendment adopted November 8, 1904.*]

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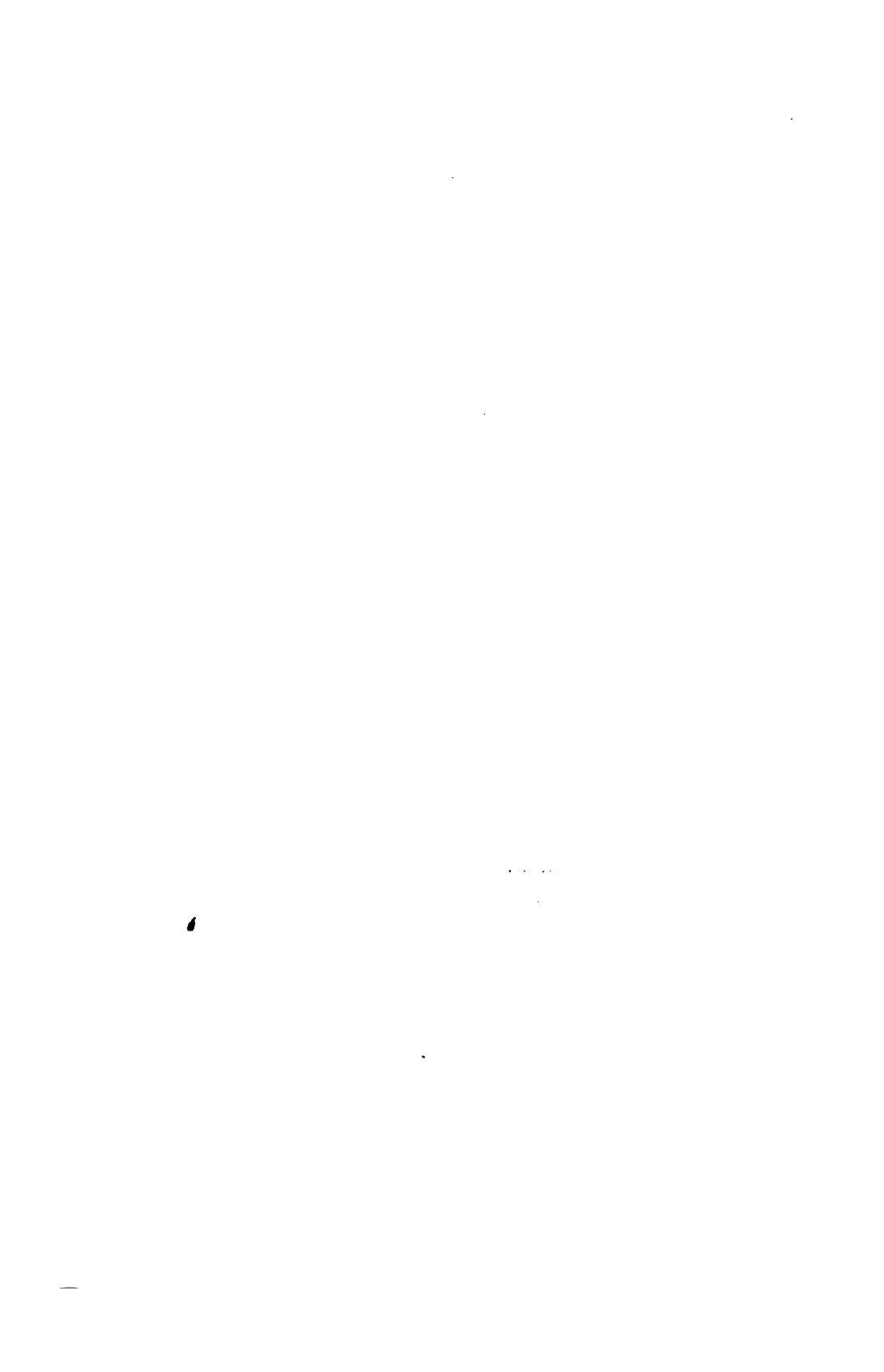
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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Crim. No. 3. First Appellate District.—May 22, 1905.]

THE PEOPLE, Respondent, v. C. L. CURTIS, Appellant.

CRIMINAL LAW—LEWD ACTS UPON CHILD—SEX OF PARTIES IMMATERIAL—SUFFICIENCY OF INFORMATION.—An information charging the commission of lewd acts upon a child under the age of fourteen years, with the intent described in section 288 of the Penal Code, need not set forth that the defendant and the child are of opposite sexes, nor contain any statement as to the sex of the parties or either of them. It is sufficient that the information charges the offense substantially in the language of the statute.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

George F. Carroll, De Witt Turner, and W. J. Marcum, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

COOPER, J.—Defendant prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

The prosecution was under section 288 of the Penal Code, which reads as follows: "Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes, provided for in part two of this code upon or with the body, or any part or member thereof,

of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year."

The sole point relied upon here is, that the information fails to charge a public offense, because it does not show that the defendant and the child upon and with whom the crime was committed are of opposite sexes; that it does not show that defendant is a male, nor that the child is a female.

It is not necessary that the information contain any statement as to the sex of the parties or either of them. Any person who commits the acts, named in the section, upon or with the body of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or child is guilty of a crime under the section. If the acts prohibited were committed by defendant upon or with the body of a child of the same sex as defendant, he would nevertheless be guilty. The legislature has not seen fit to make any reference to sex in the section, and it is not for this court to do so. It is sufficient that the information charges the offense substantially in the language of the statute.

The judgment and order are affirmed.

Hall, J., and Harrison, P. J., concurred.

[Crim. No. 2. First Appellate District.—May 22, 1905.]

THE PEOPLE, Respondent, v. JOHN CARROLL, Appellant.

CRIMINAL LAW—INFAMOUS CRIME AGAINST NATURE—INSUFFICIENT INFORMATION.—An information which does not designate the offense of "the infamous crime against nature" as defined in section two hundred and eighty-six of the Penal Code, but merely charges that the defendant did "commit the crime against nature, with and upon one Frank Derby" by "having carnal knowledge of the body of said Frank Derby" is insufficient in not alleging that Frank Derby was a male person.

Id.—SEX—JUDICIAL KNOWLEDGE—PRESUMPTION.—Judicial knowledge cannot be taken of the sex of a party upon whom the infamous crime against nature is committed from the name alone. The presumptions are all in favor of innocence; and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Henry C. Gasford, Judge presiding.

The facts are stated in the opinion of the court.

William S. Barnes, and H. H. McCloskey, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

COOPER, J.—The information states: "The said John Carroll, on the tenth day of March, A. D. nineteen hundred and four, at the said city and county of San Francisco, state of California, did then and there willfully, unlawfully and feloniously commit the crime against nature with and upon one Frank Derby by then and there having carnal knowledge of the body of said Frank Derby, contrary to the form, etc. . . ." Defendant was found "guilty as charged in the information," and sentenced to a term of seventeen years in the state prison. He now claims that the information does not charge a public offense, and that is the only question that need be considered.

Defendant was prosecuted under section 286 of the Penal Code, which reads as follows: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

The section does not define the crime nor state in what it consists, but denominates it "the infamous crime against nature."

At common law the crime attempted to be charged was called sodomy. Blackstone speaks of it as the "infamous crime against nature committed with either man or beast, a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved that the accusation should be

clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself." (4 Blackstone's Commentaries, 216.)

The crime is now, and has been since the days of Blackstone, designated by law-writers and judges as "*the infamous crime against nature*" (25 Am. & Eng. Ency. of Law, 2d ed., p. 144, and cases cited; *Honselman v. People*, 168 Ill. 172, [48 N. E. 304]; *State v. Chandonette*, 10 Mont. 280, [25 Pac. 438]; *People v. Oates*, 142 Cal. 12, [75 Pac. 337]); and it is so designated in the Penal Code.

The information in this case, however, does not so designate it, but uses the words "crime against nature." The information, while ignoring the name by which the statute designates the crime, attempts to state what the defendant did. If the facts stated were sufficient to show plainly and unequivocally that a crime had been committed, it would be sufficient, but we do not think that they come up to this standard. It is charged that the defendant did "commit the crime against nature with and upon one Frank Derby by then and there having carnal knowledge of the body of said Frank Derby." The words "carnal knowledge" mean sexual connection. (Bouvier's Law Dictionary; Century Dictionary; *Commonwealth v. Squires*, 97 Mass. 61.)

It is thus in effect stated that defendant had sexual connection with Frank Derby. If the Frank Derby, named, was a female, then the defendant is merely charged with having sexual intercourse with a female, which is not of itself a crime. There is no allegation that Frank Derby, the person of whose body the defendant is alleged to have had carnal knowledge, was a male person. We cannot take judicial knowledge of the sex of a party upon whom the crime is alleged to have been committed from the name alone. The name Frank is generally given to males, but it is sometimes given to females. The information might then be true and yet the defendant be innocent of a crime. The courts do not favor technical constructions which go to the form rather than to the substance; particularly is this so in a criminal case where a defendant has been tried and convicted. If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding that a crime has been committed, the information or indictment will be held sufficient. It will also be held sufficient

where the crime is substantially alleged in the words of the statute or their equivalent. But in all cases it must clearly appear that if the facts alleged are true, the defendant is guilty of a crime. (*People v. Williams*, 35 Cal. 675; *People v. Terrill*, 127 Cal. 99, [59 Pac. 836].) In the latter case it is said: "In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged."

We therefore conclude that the facts stated do not constitute a public offense.

The judgment and order are reversed.

Hall, J., and Harrison, P. J., concurred.

[S. F. No. 3144. No. 18. First Appellate District.—May 24, 1905.]

J. W. FARRELL, Respondent, v. BOARD OF POLICE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Appellants.

POLICEMEN—DURATION OF OFFICE—REMOVAL BY APPOINTING POWER.—

Policemen appointed by the board of police commissioners, having no term of office fixed by law, hold during the pleasure of the appointing power under section 16 of article XX of the constitution; and the board of police commissioners may remove a policeman without charges, notice, or trial.

ID.—REINSTATEMENT—MANDAMUS—STATUTE OF LIMITATIONS.—

Mandamus will not lie to compel the reinstatement of a removed policeman; and an application therefor nine years after the removal is barred by the statute of limitations.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Franklin K. Lane, City Attorney, and R. M. Sims, Assistant, for Appellants.

Curtis Hillyer, for Respondent.

HALL, J.—This is an action by plaintiff against the defendants for a writ of mandate, directed to and requiring the board of police commissioners of the city and county of San Francisco to admit plaintiff to the office of policeman on the regularly constituted police department of the city and county of San Francisco.

In plaintiff's petition he alleges that the board of police commissioners removed him from his office of policeman in the month of March, 1892, arbitrarily and without any charges being preferred against him, and without any trial or hearing upon any charges; and that said commissioners have ever since said time deprived him of the use and enjoyment of his said office, and that he is still by them deprived of the enjoyment of said office.

The petition for the writ was filed in the month of May, 1901. To this petition the defendants demurred upon the general ground that it did not state facts sufficient to constitute a cause of action or to entitle plaintiff to a writ of mandate; and also upon the ground that "plaintiff's cause of action and right to a writ of mandate is barred by subdivision 1 of section 338 of the Code of Civil Procedure and by section 343 of the Code of Civil Procedure."

The lower court overruled the demurrer, defendants answered, a trial was had, and judgment went against the defendants as prayed for in plaintiff's petition.

So far as the plea of the statute of limitations is concerned, a precisely similar case was presented to the supreme court since the taking of the appeal in this case, in the case of *Jones v. Board of Police Commissioners of San Francisco*, 141 Cal. 96, [74 Pac. 696]. The only difference between the Jones case and the case before this court is, that in the Jones case the delay in bringing the action was about seven years, while in this case it exceeds nine years. In that case it was held that the plea of the bar of the statute of limitations was well taken, and the judgment of the lower court in favor of the plaintiff in that action was reversed, with directions to the court below to sustain the demurrer and dismiss the proceeding. The principle of the Jones case controls this. (See, also, *Barnes v. Glide*, 117 Cal. 1,¹ [48 Pac. 804]; *Barber v. Mulford*, 117 Cal. 356, [49 Pac. 206].)

¹ 59 Am. St. Rep. 153.

As to the general demurrer that the petition did not state a cause of action, the same question was presented in the case of *People v. Hill*, 7 Cal. 97, the only difference being that in the latter case the question arose under section 7 of article XI of the old constitution, while in the present case it arises under section 16 of article XX of the present constitution. Each in substance provides that when the duration of an office is not provided for by the constitution it may be declared by law, and if not so declared it shall be held during the pleasure of the authority making the appointment. In the *Hill* case it was said: "The only way in which this power of removal can be limited is by first fixing the duration or term of office, and then providing the mode, if deemed necessary, in which the officer may be removed during the term. A law which simply provides that a party shall not be removed except in a given case, where the duration is not declared, would, in our opinion, be unconstitutional." It was accordingly held in the case of *People v. Hill* that the board of police commissioners could remove a police officer without any charges being preferred and without any trial, for the reason that his term of office was not fixed, and he held office only during the pleasure of the appointing power.

The same question was presented in the case of *Smith v. Brown*, 59 Cal. 672. That case arose under the present constitution and the charter of Sacramento. The trial court rendered judgment upon demurrer for the defendant, and the court affirmed this judgment on the authority of *People v. Hill*.

In *Patton v. Board of Health of San Francisco*, 127 Cal. 388,¹ [59 Pac. 702], the court held that where an officer's term is not fixed by law or by the constitution, such officer holds only during the pleasure of the appointing power, and may be removed without charges, notice, or trial, citing *People v. Hill* and *Smith v. Brown*.

Counsel for the respondent seems to concede that if *People v. Hill* is sound the judgment in this case must be reversed; but he urges with much earnestness that the doctrine laid down in *People v. Hill* is not sound, and that the case should be overruled. We think the rule in *People v. Hill* is correct, and see no reason for departing from it.

¹ 78 Am. St. Rep. 66.

The judgment is reversed, with directions to the lower court to sustain the demurrer and dismiss the petition.

Cooper, J., and Harrison, P. J., concurred.

[Crim. No. 4. Third Appellate District.—May 24, 1905.]

THE PEOPLE, Respondent, v. SAM DAVIS, Appellant.

CRIMINAL LAW—BURGLARY IN HOUSE OF ILL-REPUTE—EVIDENCE—MISCONDUCT OF DISTRICT ATTORNEY.—Upon a prosecution for burglary, where it appeared that it was committed in the room of an inmate of a house of ill-repute, the character of which was shown by defendant, though he claimed an *alibi*, evidence was admissible to show the acquaintance of an eye-witness to the burglary with the defendant, the frequency of his visits to the house, and his familiarity with the premises, and his knowledge of the manner in which the prosecuting witness kept her money and other articles of value in her room, and the articles missed by her on the night of the burglary; and there was no misconduct of the prosecuting attorney in introducing such evidence, though it had a tendency to place the defendant in an unenviable light before the jury.

ID.—CROSS-EXAMINATION OF DEFENDANT—RELATIONS TO PROSECUTING WITNESS—JEALOUS RESENTMENT AS TO MARRIAGE—FAILURE TO REMOVE TRUNK.—Where the defendant on direct examination testified freely as to happenings, conduct, and conversations at the house, and as to the jealous resentment and rage of the prosecuting witness when informed of his intended marriage, as being the motive for an unfounded accusation against him, it was proper to cross-examine him as to any matter or period of time embraced in his direct examination, and to question him touching his engagement and marriage, and to show his failure to remove his trunk from that house.

ID.—ARGUMENT OF DISTRICT ATTORNEY—REVERSIBLE MISCONDUCT NOT SHOWN.—It was not misconduct justifying a reversal for the district attorney to denounce the theory and the credibility of the defendant and severely to criticise him from his own evidence; nor to allude to the women as of negro extraction, where the testimony shows that one was colored, and their appearance on the stand may have indicated it; nor to charge that defendant was living off the earnings of the prosecuting witness, where the defendant introduced evidence that he obtained money from her.

ID.—REFUSAL OF INSTRUCTIONS—DUTY OF INDIVIDUAL JURORS.—It was not error to refuse requested instructions addressed to the duty of individual jurors.

- ID.—PRESUMPTION OF FAIR CHARACTER.**—An instruction as to the presumption of the fair character of the defendant was properly refused where the evidence does not warrant a presumption as to his general fair character, and the instruction was too broad in not being limited to the traits of character necessarily involved in the particular case.
- ID.—REQUESTS COVERED BY CHARGE.**—It is proper to refuse requested instructions covered by the charge of the court.
- ID.—PROPER INSTRUCTIONS—CRIMINAL INTENT—PROVINCE OF JURY.**—Instructions based upon the evidence and stating that the intent to commit larceny must exist at the time of the entry, and instructions merely restating the principle that jurors are the exclusive judges of the weight and sufficiency of the evidence stated elsewhere in the charge, and that their judgment as reasonable men is the test of their right to believe or disbelieve the testimony of a witness, were properly given.
- ID.—OMISSION OF QUALIFICATION—INSTRUCTIONS TO BE CONSTRUED TOGETHER.**—Instructions must be taken together as a whole, and the omission of a qualification in one instruction, given at the request of the people, where the omitted qualification is plainly stated in other instructions given at the request of the defendant, could not have misled the jury.
- ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION—CUMULATIVE EVIDENCE.**—A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the court, which is not abused in denying the motion where the newly discovered evidence is merely cumulative.

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. J. E. Prewett, Judge.

The main facts are stated in the opinion of the court.

Instructions 10, 17, and 18 related to the duty of individual jurors, and instruction 19 was covered in substance by the charge of the court.

L. L. Chamberlain, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

McLAUGHLIN, J.—The defendant was convicted of burglary, and appeals from the judgment and an order denying his motion for a new trial.

We will notice only assignments of error discussed by counsel for appellant, assuming that all others are waived.

1. It is first urged that the district attorney and his as-

sistant, upon the examination of witnesses, and in argument, indulged in misconduct calling for reversal, and that the trial court likewise transgressed to the detriment of defendant.

It appears from the evidence and the unchallenged statement of counsel for appellant that Lillie Banks and Bertha Hodge were inmates of a house of ill-repute in Chinatown at Auburn. The burglary charged consisted of entering the room of the former in said house with intent to commit larceny.

Bertha Hodge was the principal witness for the prosecution, and testified that after midnight on July 17, 1904, she saw the defendant go up the back stairs of this house, and presently thereafter saw him standing by a dresser in the room occupied by Lillie Banks, taking some money from the latter's purse. That later he came out, said he wanted to see Lillie, and went the way he came. During her examination many questions were asked and answered touching her acquaintance with defendant and the frequency of his visits to this house.

The prosecuting witness Banks was allowed to testify as to defendant's familiarity with the premises, and his knowledge of her manner of keeping money and other articles in the dresser and room. She also enumerated articles missed by her that night.

Upon this examination, and the arguments of counsel touching the facts elicited, many charges of misconduct against counsel and court are based.

The evidence was certainly relevant. It tended strongly to show that the witness Hodge could not have been mistaken as to the person she saw in that room that night, and accounted for the rapidity and certainty of movement manifested by the intruder.

If any doubt as to its relevancy existed at the time of its introduction, that doubt must have vanished when the accuracy and credibility of the witness Hodge were directly assailed by evidence tending to prove an *alibi*.

True, such evidence had a tendency to place defendant before the jury in an unenviable light, but it was admissible under the same rule which would make it unquestionably proper had it related to a similar occurrence in a house occupied by respectable people. The character of the house was

placed before the jury by defendant, and its character could not affect the admissibility of the evidence assailed.

It is argued that the cross-examination of defendant touching his engagement and marriage, and his failure to take his trunk from that house was erroneous, and as the objection of misconduct pertains thereto that phase of the case will be examined now.

Most, if not all, of the evidence as to the woman's connection with the trunk and defendant's relations with her, came before the jury through defendant's agency, and the defendant in direct examination introduced the subject of marriage.

In his direct examination he testified fully as to happenings, conduct, and conversations at that house, and it was perfectly competent to cross-examine him touching everything which occurred during the period covered by the direct examination, including his failure to remove his trunk from the house where the irate Miss Banks was domiciled. (*People v. Teshara*, 141 Cal. 636, [75 Pac. 338]; *People v. Russell*, 46 Cal. 123.)

In his direct examination, as well as in the direct and cross-examination of other witnesses, there was an evident attempt to make it appear that the woman Banks when informed by him of his intended marriage became enraged and threatened to cut the heart out of any woman he married, and that the subsequent unfounded accusation against him was the result of her jealous resentment. In view of this fact his conduct was very significant, and the prosecution certainly had the right to cross-examine him as to any matter or period of time embraced in his direct examination.

Sufficient has been said to indicate that the charges of misconduct, and errors assigned relating to the testimony above referred to, are not well taken.

Nor was there error in rulings as to other evidence offered by the prosecution. Most of the matter objected to was admissible under well-settled rules of law (Code Civ. Proc., secs. 1870, subd. 3, 1881, subd. 1), and that which was not admissible was either excluded when offered or subsequently stricken out.

Other assignments of error relating to the admissibility of evidence have been carefully examined and we are satisfied that no prejudicial error was committed.

No substantial right of defendant was prejudiced by the remarks of the court here criticised.

Turning to alleged misconduct in argument and in the opening statement, we find no error sufficient to justify reversal.

One theory of the defense, clearly deducible from the evidence, was, that this prosecution was but the malicious attempt of an abandoned woman, inspired by jealous hatred, to ruin a man who had turned away from her.

Argument touching this theory and the degree of credit which should be accorded the testimony of these women and this defendant, did bring upon him severe and scathing criticism. But evidence upon which it was based was in the case through his election, and under these circumstances he can hardly complain. It is said that there is no evidence justifying the assertion in argument that the women were of negro extraction. Doubtless their appearance on the stand indicated such fact, and there is some evidence that one of them was "colored." It is also urged that it was improper to charge that defendant was living off the earnings of Lillie Banks, but defendant himself introduced evidence showing that he obtained money from her.

The references to the presence of his mother and other relatives during the trial might well have been omitted, but these references were as apt to help as to injure defendant, and too often attempts to arouse sympathy for defendants in this way make such references proper if not necessary, and there is nothing before us to show that it was not proper here.

It follows that there was no such misconduct as would justify reversal. (*People v. Wells*, 100 Cal. 459, [34 Pac. 1078]; *People v. Ward*, 105 Cal. 340, [38 Pac. 945]; *People v. Romero*, 143 Cal. 458, [77 Pac. 163]; *People v. Perry*, 144 Cal. 753, [78 Pac. 284].)

There was no impropriety in the opening statement. (*People v. Lewis*, 124 Cal. 559, [57 Pac. 470].)

2. Instructions numbered 10, 17, 18, 19, requested by defendant, were properly refused. (*People v. Rodley*, 131 Cal. 259, [63 Pac. 351]; *People v. Perry*, 144 Cal. 754, [78 Pac. 284].)

There was no error in refusing instruction numbered 13 requested by defendant. We have seen that there was evi-

dence in the case which would hardly permit an instruction carrying with it the presumption that his general character was fair.

Besides, the instruction was altogether too broad. A defendant is clothed with a fair character for the purposes of the case. (*People v. Fair*, 43 Cal. 149.)

But this presumption extends only to traits of character necessarily involved in the particular case. If defendant's veracity, honesty, or any other trait is in issue it applies. But it would hardly be contended that in a case of assault, evidence as to chastity or honesty would be relevant, and we are of the opinion that this presumption applies only where evidence to the same effect would be proper. (*Ackley v. People*, 9 Barb. 609; *Danner v. State*, 54 Ala. 127.¹)

Instruction numbered 20, also requested by defendant, was properly refused, the substance thereof being covered by other instructions.

Nor was there error in modifying instruction numbered 23.

There was no error in giving instruction numbered 9, requested by the prosecution. It was predicated upon evidence in the case, and as it expressly states that the intent to commit larceny must exist at the time of entry, *People v. Lowen*, 109 Cal. 381, [42 Pac. 32], has no application.

Instruction numbered 25, given at the request of the people, is not erroneous. It is but a restatement of the principle that juries are exclusive judges of the weight and sufficiency of evidence, stated elsewhere in the charge. The jurors were told that their judgment as reasonable men is the test of their right to believe or disbelieve the testimony of a witness, and this of necessity is the rule governing the exercise of the discretion mentioned in section 2061 of the Code of Civil Procedure.

Instruction numbered 14, given at request of the people, standing alone would be objectionable, as omitting the elements that possession must be recent and unexplained. But instructions must be viewed in the light of evidence to which they apply, and the only evidence of possession in this case was confined to a period of three days after the offense, and the defendant denied such possession *in toto*, only explaining

¹ 25 Am. Dec. 625.

that one article, a collar, was never in the possession of the prosecuting witness.

Again, instructions must be read as a whole, and this instruction, read in connection with instructions 28 and 29, given at the request of defendant, where the omitted elements were plainly stated, could not have misled the jury. (*People v. Gleason*, 122 Cal. 372, [55 Pac. 123]; *People v. Morine*, 61 Cal. 367; *People v. Gibson*, 106 Cal. 458, [39 Pac. 864]; *People v. Worden*, 113 Cal. 569, [45 Pac. 844]; *People v. Jackson*, 138 Cal. 462, [71 Pac. 566].)

The instruction was general in its nature, and therefore it did not and could not assume a fact not proven. It contains no intimation that defendant had committed larceny.

We think the instruction given by the court of its own motion, though perhaps unnecessary, was not erroneous. It is not within the rule invoked by counsel, and if it was the testimony of the district attorney is of such slight importance that the instruction could have caused no prejudice.

3. A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and unless it clearly appears that this discretion was abused the conclusion of the trial court will not be disturbed. (*People v. Buckley*, 143 Cal. 392, [77 Pac. 169].) The newly-discovered evidence was entirely cumulative, and hence no abuse of discretion here appears.

The judgment and order are affirmed.

Buckles, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 26, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on July 21, 1905. (See 147 Cal. 346.)

The following is the opinion of the district court of appeal denying a rehearing:—

McLAUGHLIN, J.—Ordinarily the formal order would be the only response to a petition for rehearing.

But mistaken brevity in the opinion filed, having led counsel of recognized ability to the belief that we had based the decision on mistaken facts, prompts a departure from the rule in this instance. We have again carefully examined the evidence and specifications, only to reach the same conclusion.

All that reached the jury touching the character of the house came into the case through defendant's agency, and the character of the inmates necessarily came with it. Strong and convincing evidence of defendant's relations with the woman Banks was presented to the jury through the same channels, and that which came to the jury through the prosecution was admissible under well-settled rules of evidence.

The testimony of defendant alone tells the story of his relations with her. Jurors must be credited with average intelligence, and it needs no more to know that early morning visits to the room of a prostitute, borrowing money from her, and stirring her to wrath and threats by the story of contemplated marriage, indicate more than a merely casual and platonic intimacy. And when to this is added the testimony of William Campbell and George Storrs, it needs not her possession of his trunk or other facts wrung from Lillie Banks and other witnesses on unwarranted cross-examination to remove all doubt as to what their relations were.

True, some evidence as to their relations did reach the jury through the prosecution, but more of it was part and parcel of testimony touching his admissions of guilt. These admissions were none the less admissible because they were made to a prostitute while he was seated upon the bed of shame in which she was lying.

His familiarity, his admissions, and conduct incompatible with his innocence, were relevant facts, and pertinent evidence cannot be excluded merely because it savors of the brothel and carries with it the stigma of infamy. Besides, the bulk of it came in without objection. (*People v. Lane*, 101 Cal. 517.)

The court sustained objections to and struck out answers to the two questions so bitterly complained of. The refusal to check counsel by express command was neutralized by counsel refraining from further questioning.

Ordinarily irrelevant questions tending to show other wrongful acts or moral depravity would be prejudicial, but when a defendant through his own lips and witnesses writes his shame upon the record, it would be sticking in the bark to hold that mere insinuations could injure.

Section 1404 of the Penal Code commands that error shall be disregarded, "unless it has actually prejudiced the

prosecution to establish the guilt of the defendant must be proved by the evidence beyond a reasonable doubt, and if the jury are not entirely satisfied beyond all reasonable doubt that such fact and circumstance has been proven, it is your duty to find a verdict of not guilty," is favorable to the defendant, and when construed with other correct instructions given on that subject the defendant cannot complain.

Id.—REFUSAL OF INSTRUCTIONS.—It was not error to refuse instructions requested by the defendant where all the matter contained in them is found in other instructions given by the court.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

J. O. Prewett, and J. S. Daly, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

BUCKLES, J.—Defendant was informed against by the district attorney of the county of Sacramento for the crime of murder, alleged to have been committed in the city of Sacramento on the sixth day of February, 1904, by killing one Henry Salt. He was tried, found guilty of murder in the first degree, with punishment fixed for life in the state prison. Appeal is from the judgment and order overruling his motion for a new trial.

During the examination of the jurors on their *voir dire*, and after six persons had been accepted and sworn to try the case, and while the examination of juror Campbell was progressing, Campbell remarked, in answer to a question, that he would have to be pretty well convinced, especially in circumstantial evidence, because he had seen one case go wrong in Sacramento on circumstantial evidence, the judge remarked, "That is one case out of ten thousand; one out of ten thousand; that is about the rate." And further on in the examination of Campbell, when defendant's attorney called the court's attention to this remark, the judge replied. "I say so yet." This is assigned as error. It is claimed by the defendant that the remarks of the court were in effect charging the jury as to the weight and reliability of circumstantial

evidence, and that out of ten thousand convictions in Sacramento County on circumstantial evidence one was innocent and nine thousand nine hundred and ninety-nine were guilty. This was assigned as error on the part of the trial judge. The statement of the judge was highly improper and might well have been left unsaid. The first case cited by defendant in support of his contention is that of *People v. Fong Ching*, 78 Cal. 173, [20 Pac. 396]. In that case the defendant was on trial for having offered policeman Martin a bribe to induce Martin to testify falsely in a murder trial. The defendant testified in his own behalf and said he had given Martin several sums of money amounting to about four hundred dollars, but that it was for his friendship and to induce him to testify merely to the truth and not to testify falsely against one Lee Chuck in a murder case. The judge said to the jury in one of his instructions: "If you believe the defendant's version, your verdict should be not guilty. It is not a crime in this state to encourage a witness with pecuniary gifts to be truthful, but neither is it *among the recognized customs of 'his country to subsidize the personal integrity of our citizens in order to prevent them from lapsing into falsehood and perjury.'*" The court said: "This language could have but one meaning and purpose. In addition to incorporating an unproved fact into the case, it was an argument against the truthfulness of the defendant's testimony, and its direct tendency was to induce the jury not to believe it." This was an attempt on the part of the judge to instruct the jury as to the weight to be given the defendant's testimony, and was clearly error.

In *People v. Travers*, 88 Cal., at page 236, [26 Pac. 89], cited by defendant, the court told the jury in its charge, "During the argument of this case your attention has been called to a number of cases in which it was claimed that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no proof in this case of any such fact, *and you are not justified in considering* such matters in determining the guilt or innocence of this defendant. . . . If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband."

The court said: "This instruction is clearly erroneous. In

the first place it is objectionable—although perhaps not fatally so—on account of its apparent hostility to the defendant. The jury would be very apt to get the impression from it that the court considered the defendant one of the ‘criminals’ alluded to, and feared the jury would fail to convict him on account of ‘sympathy or prejudice.’ In the second place, it is objectionable as an argument in favor of the prosecution on the weight of evidence, and thus was an invasion of the province of the jury.”

In the case at bar the words complained of were not found in an instruction to the jury, but a remark of the court during the impaneling of the jury, and could not have had any other effect than to impress upon the minds of the jurors the fact that circumstantial evidence was to be considered and that conviction could be had on such evidence, and therefore not subject to the criticisms made in the cases cited. Therefore, the error, if any, was not of a nature to injure the defendant. (*People v. Urquidas*, 96 Cal. 239, [31 Pac. 52].)

It is claimed by the defendant that the evidence in the case is totally inadequate to convict him. The testimony is circumstantial, but the circumstances all point to the defendant’s guilt, and are as follows: The defendant and deceased were seen together on I Street drunk, arm in arm, puddling in the mud. They went to an open box-car standing on I Street and the defendant helped deceased into the car and went away, leaving the door open. This was 12:45 P. M. A boy eleven years old had seen the defendant and two or three men together near China Slough, near Third and I streets, at 11:55 A. M., and the defendant was sitting on the stomach of deceased, and whenever deceased made an effort to get up, defendant would hit him in the jaw. The boy saw the two or three men leave and the deceased still on the ground. This witness was not positive in his identification of defendant or deceased. At about 1:15 defendant was seen at a saloon at No. 229 I Street and there was blood on his hand. The car door was open at 1:20 or 1:30 P. M. from ten to fourteen inches.

Between three and four o’clock the defendant went with one Matteson to deliver a load of coal, and while with Matteson asked where he could sell a dead man; and on their return said to Matteson, “When we are coming back I will

show you where the stiff is; he is in a car." Defendant also told this witness that if he sold this dead man he had another one in sight, and that he would divide with witness. On their return from delivering the coal defendant took Matteson to the box-car on I Street. The car was closed and defendant opened the door; the body of deceased was lying in the west end, no hat on and still warm; defendant jumped into the car, raised the head of deceased and said, "Isn't he a big, nice, juicy son of a bitch?" The flap of the pants was lying open. Defendant and witness then went to the coroner's office and tried to sell a dead body. The defendant said to Fenton, who was in the coroner's office, "I have got one for you; how much is there in it? I have got to have some money." The witness Fenton, who was also an undertaker, went with defendant to the car for the body, and on approaching the car defendant jumped out of the wagon, opened the car door, went to the body, grabbed hold of it and pulled it to the door of the car and helped to place it in the wagon. The sternum was caved in, the lower jaw broken, and the body was beaten in a way to indicate that some blunt instrument had been used in inflicting the wounds, for the skin was not broken; the heels of the shoes worn by defendant showed blood-stains and blood-stains were on his overalls; he declared he had no acquaintance with deceased; when the coroner asked him when he discovered the body he answered, "About twelve o'clock." When the coroner said to him, "Now it is after four o'clock. Why didn't you report this before?" he answered, "Well, I don't know." Blood-spots and stains were found in the car. The deceased must have met his death in the car. Defendant tendered no explanation of these circumstances. We think these circumstances were sufficient to indicate the guilt of the defendant, and as the jury found him guilty, they must have believed him guilty beyond a reasonable doubt.

The shoes and overalls of the defendant, and the hat found in the car after the body was removed, were all introduced in evidence over defendant's objection. We think there was sufficient identification of the shoes and overalls as belonging to the defendant and the ones he wore between 11:55 A. M. and 3:30 o'clock P. M. of the day of the killing, and each article appeared to have human blood-stains on it. The hat

was not identified as the one deceased wore when he was seen with defendant going into the car, but there was nothing about the hat which would make it a link in the chain of evidence showing guilt, and could do the defendant no harm.

Dr. Stevenson, the medical expert who made the autopsy on the body of the deceased, testified that he found abrasion on face, slight abrasion of left ear, abrasion and contusion over left cheek, right ear badly contused and slightly lacerated, fracture of right lower jaw, contusion an inch in diameter over inner third of right collar-bone, contused wounds on other parts of collar-bone and one below the navel, a contused wound on the left groin, contused wound on the outer side of the left hip and other scattering contused wounds on the body, and a general bruised condition about the chest. "All the ribs on the right side were fractured except the upper two; the third, fourth, fifth, sixth, seventh, eighth, and tenth ribs on the left side were fractured. There was a contusion of the apex of the heart which was caused by this violent force, forcing the chest wall down on the heart. There was a multiple rupture of the liver, done by the same cause. There was a considerable quantity of blood in both pleural cavities and in the abdominal cavity. Both lungs were bruised, and this condition was caused by the chest wall being forced in on them. The top of the chest was literally crushed in. Those wounds were necessarily fatal." The witness was then asked, "What, in your opinion, was the character of the instrument by which those wounds were caused?" Defendant objected on the ground that "this is not a subject of expert testimony." The objection was overruled, defendant excepted, and the witness answered, "It was made from some blunt instrument; I should say rather, narrow, without any cutting edges—I mean sharp, cutting edges; there was no break in the skin; it was a bruised condition; so it must have unquestionably been produced by some blunt instrument of some kind." Defendant moved to strike out the witness's answer on the same ground, which the court denied, and he excepted. The witness then continued: "The ribs were broken clear off and forced in, tearing the pleura as they went by. The liver was ruptured in about five places."

On cross-examination the witness testified: "Death would

have come very soon after having received such injuries. I do not think he could have lived three quarters of an hour, and it would have been impossible for deceased to have walked after receiving those injuries." In support of defendant's contention that the question as to the character of the instrument by which the wounds were caused is not expert testimony and is harmful to the defendant he cites the Durrant case (116 Cal., pp. 215-218, [48 Pac. 84, 85].) In that case a hypothetical question was put to the expert physician, something like this: "If you wanted to keep the head—the face and neck—in an upright position, not turned to one side or the other, of a dead body still warm with life, what would you do to keep it in that position?" The objection to the question was, that it was not a hypothetical question involving any elements in the case. The ruling and reasoning for same are unnecessary to quote here. The witness answered: "I would place it first in the position in which I wanted it, and, if it did not remain there, I would prop it up by supports in the desired position." Having disposed of the question raised in that case by Mr. Deuprey's objection, the court passed to the consideration of the proposition that the hypothetical question and answer were not the subject of expert testimony—a question, says the court, that was not presented to the trial judge. The court further said: "A jurymen would be absolutely deficient in common sense and common knowledge who did not know that the way to keep an inanimate object in a given position would be to support it by props and stays in that position. . . . There was here no question of professional, scientific, or technical skill or knowledge. But the question and answer were absolutely without injury."

And so it is here. The witness had described the wounds, and, surely from his detailed statement of their description and condition as he found them, it would show to the very dullest mind that they were inflicted with something other than a sharp instrument, but that in making them some blunt instrument must have been used, and the jury would be forced to such conclusion without the statement of the physician that the instrument was a blunt one. The shoes introduced in evidence were shown to be the shoes worn by defendant, and the jury had a right to infer from the descrip-

tion of the wounds themselves that they were made with the heels of those very shoes.

A witness called as an expert should not be permitted to give his opinion and conclusions upon any matter not clearly of the nature of expert evidence. And when such testimony is admitted and is of such a nature as to present to the jury a conclusion other than that which the jury might properly and reasonably reach from the other testimony in the case, then such testimony is harmful and it will be error to admit it. For the reasons here stated, there was no error in admitting this evidence.

Certain instructions were given by the court of which the defendant complains. The case was one of circumstantial evidence, and the court had fully instructed the jury as to the nature, force, and general rules of application of circumstantial evidence, and then said further: "If, under the foregoing rules, the testimony in this case is sufficient to convince you, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged, *although the act may be surrounded in a degree by a doubt*, then I charge you that it is your duty to convict." This very instruction was given in *People v. Anthony*, 56 Cal. 397, and approved. But we think the trial judge might very well have omitted the words italicized, as they seem to be meaningless when all the rules and definitions of circumstantial evidence are given, and in view of the fact that the jury were repeatedly admonished that they must be satisfied from the evidence and beyond a reasonable doubt of the defendant's guilt, or they must acquit him.

The defendant claims the court erred in giving the following instruction: "The jury are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant, must be proved by the evidence, beyond a reasonable doubt, and if the jury are not entirely satisfied beyond all reasonable doubt, that such fact and circumstance has been proven, it is your duty to find a verdict of not guilty." The instruction seems as favorable to the defendant as he could ask, and, taken with all the other instructions in the case, and especially with the defendant's instruction No. 6, as modified by the court, he has no reason to complain. The instruction No. 6 is as follows, to wit: "You are instructed that when independent facts and

circumstances are relied upon to identify the accused as the person who committed the crime charged, each material independent fact or circumstance necessary to complete such chain or series of independent facts tending to establish his guilt, should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. That is to say, each essential, independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty, beyond a reasonable doubt, and to your entire satisfaction, or you must acquit the defendant."

The refusal of the court to give defendant's instruction No. 15 and part of No. 2 is claimed as error, but all the matter contained in these two instructions is found in other instructions which were given, and the defendant had the full benefit of all they contained, and no error was made.

For the reasons herein stated, the judgment and order are affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[Crim. No. 1. Third Appellate District.—May 24, 1905.]

THE PEOPLE, Respondent, v. JAMES McROBERTS,
Appellant.

CRIMINAL LAW—MURDER—MISCONDUCT OF DISTRICT ATTORNEY IN ARGUMENT.—It was not misconduct for the district attorney in his argument to the jury to refer to a knife found in the possession of the deceased to rebut any inference that defendant's counsel may have drawn from the fact that it was not introduced in evidence; nor to urge that the evidence was conclusive of defendant's guilt. But it was unwarranted license to refer to the criminal history of the county, and to avow his belief in the efficacy of mob law, and to say that it would have been a good thing for the county if the defendant had been lynched; though such misconduct was not prejudicial or ground for reversal where the homicide was admitted, and the evidence makes it reasonably certain that the jury were not led by the misconduct of the district attorney to return a verdict which they otherwise would not have found.

Id.—INSTRUCTIONS—CRIMINAL INTENT TO BE GATHERED FROM CIRCUMSTANCES—ILLUSTRATION NOT MISLEADING.—An instruction correctly

stating the law, that in order to constitute the crime of murder there must exist a union or joint operation of the act and intent or criminal negligence, is not argumentative or misleading because it illustrates the impossibility of looking into or photographing or determining the workings of the human mind, and shows the necessity of gathering the intention with which the act was done from all the circumstances surrounding it.

ID.—DEFINITION OF MURDER—"MALICE"—An instruction defining murder substantially in accordance with section 188 of the Penal Code, and stating that legal "malice" may exist where there is no spite or hatred or ill-will, and that an unlawful act done intentionally and without just cause or excuse is an act in contemplation of the law done with "malice," as that word is understood in criminal judicature, is not subject to criticism.

ID.—INSTRUCTION AS TO MANSLAUGHTER—REASONABLE DOUBT NOT REPEATED.—Where the court instructed the jury fully upon the question of reasonable doubt, it was not necessary that an instruction defining manslaughter and telling the jury that "the defendant may, if in your judgment the facts warrant it, be convicted of manslaughter" should expressly repeat the subject of reasonable doubt.

ID.—INSTRUCTION CONSTRUED.—Where the court had defined the two degrees of murder, a following instruction, beginning "From these definitions the jury will see," does not leave the jury in doubt as to what previous definitions were referred to.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

Charles W. Thomas, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was tried on an information charging him with the murder of one John Murphy and was convicted of murder in the second degree. Defendant appeals from the judgment.

There is no claim made that the evidence was insufficient to justify the verdict. The grounds of appeal urged in defendant's brief are misconduct of the district attorney in his address to the jury, and that certain instructions given the jury by the court were erroneous statements of the law and prejudicial to defendant.

1. The district attorney, apparently in reply to some comments of defendant's attorney during his address to the jury concerning a knife said to have been found in the possession of the deceased, and which the prosecution identified as belonging to deceased but did not offer in evidence, remarked: "This county has paid to have the knife examined and if he [defendant] wants that evidence he can have it." Upon objection of defendant's attorney, the court said: "Let that be stricken out, the statement 'This county has paid to have the knife examined,' etc."

And again: "As I was going to say, if they had said that Mr. Murphy cut him, then it would have been proper to have introduced the knife, and if there was blood upon it it would be evidence in their favor." Remarking upon the duty of the jury in the light of the evidence, claimed by him to be conclusive of defendant's guilt, the district attorney said that the community ask only simple justice, and added: "This has usually been denied, judging from the past criminal history of this county. One hundred and ten murders have been committed and but one hung."

Again: "Murder flourishes freely; within the past six months two men have come into this county, strangers, and have committed murders." The district attorney then called attention to what he claimed was the fact,—that it made but little difference what crime was committed "there is always some defense manufactured to save the culprit's neck," continuing in like language to some extent, and concluding: "If the people of Dunnigan had taken him [referring to defendant] out that day and strung him to a tree, they would have done a good thing for this community, and taught these red-handed devils that there is such a thing as law and punishment for their deeds."

It is claimed to be prejudicial error for the district attorney "against objection to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not." It was so held in *People v. Mitchell*, 62 Cal. 411, and *People v. Ah Len*, 92 Cal. 282,¹ [28 Pac. 286], and perhaps other cases. We cannot see that the remarks of the district attorney respecting the knife referred to were in violation of this rule. He was simply rebut-

ting any inference that the defendant's counsel may have drawn from the fact that the knife was not introduced in evidence. There was no claim made that the knife proved anything one way or the other. If there was any inference it would be under the rule favorable to the defendant. Moreover, defendant could have introduced the knife if its presence would have helped his case.

Nor was there any overstepping the limitations of duty to urge that the evidence was conclusive of defendant's guilt, as this was but a conclusion of the district attorney drawn by him from the evidence before the jury. It was, however, unwarranted license to refer as he did to the past criminal history of the county, and it was gross and reprehensible violation of duty to avow his belief in the efficacy of mob law and to say, as he did, that the lynching of defendant by the people of Dunnigan would have been a good thing for the community. There were no facts or circumstances disclosed by the evidence which would have justified such an expression of opinion even from one having little regard for the rights and duties of the public, but there was no conceivable excuse, much less justification, for a sworn officer of the law to indulge in utterances which if put into execution would be subversive of all the safeguards of the law thrown around the citizen. No allowance for the zeal, which rightly exercised by a district attorney is commendable, can condone so flagrant a burst of unrestrained passion.

While this is true, the question remains, Should the judgment of conviction be set aside for this misconduct? We must assume that the jury was composed of men possessing ordinary intelligence and as having at least ordinary regard for their oaths as jurymen. The ordinary or average American citizen is not under ordinary circumstances influenced by appeals to mob law. The provocation must be great and the exigency pressing to impel him to countenance or yield to such appeals. In the present case the homicide was admitted, and the evidence was such as to make it reasonably certain that the jury was not led by the misconduct of the district attorney to return a verdict which they otherwise would not have found. The question now before us is not the instance of attempt to argue from pertinent facts not in evidence, nor the other case, so often condemned by the courts, of seeking

to get before the jury prejudicial facts not pertinent or relevant, by persistently stating and offering to prove them, which was the case in *People v. Lee Chuck*, 78 Cal. 317, 329, [20 Pac. 719], cited by defendant. As to the remarks of the district attorney about the frequency of crime and the failure to punish it, see *People v. Molina*, 126 Cal. 505, [59 Pac. 34], where such comments were held not prejudicial error.

2. The court in its instruction marked II correctly stated the law that there must exist a union or joint operation of act and intent or criminal negligence. The court explained that it was not possible "to look into the mind of a man and see what its workings are; we cannot bring a photograph of the mind of a man and exhibit to you so as to determine clearly and absolutely what the workings of a human being's mind are. Hence from necessity the law says that you shall gather the intention with which the act was done from all the circumstances surrounding," etc.

This instruction was not, we think, either argumentative, misleading, or suggestive, as claimed by defendant. The illustration used by the court made the instruction more lucid and easier of comprehension by the jury.

Instruction IV (erroneously referred to as VI in defendant's brief) defines murder, following substantially the definition given in section 188 of the Penal Code. The court also stated that the word "malice" does not necessarily mean that the accused must have entertained toward the deceased feelings of spite, hatred, or ill-will, but that the word "malice" meant more under the statute, and the court said that there may be legal malice where there is no spite or hatred or ill-will, and explained that an unlawful act done intentionally and without just cause or excuse is an act in the contemplation of the law done with malice as that word is understood in criminal judicature. We see no ground for criticism of this instruction.

Instruction No. V is a correct definition of murder. The court added, "Under the information in this case, as aforesaid, the defendant may, if in your judgment the facts warrant it, be convicted of manslaughter." The court then proceeded to define manslaughter correctly. It is claimed that the instruction "excludes the principles of reasonable doubt." The court instructed the jury very fully as to the doctrine of

reasonable doubt. It was not necessary to repeat this doctrine in every instruction. In using the language "if in your judgment the facts warrant it" the jury must have understood from the very explicit instructions on the subject that they could find no verdict except convinced by the evidence beyond a reasonable doubt.

Instruction numbered XI was given in *People v. Iams*, 57 Cal. 115, 117, except the latter part, the omission of which does not affect or change the substance of the instruction. It is complained that the beginning of the instruction—"From these definitions the jury will see," etc.—left the jury in doubt as to what previous instructions or definitions were referred to, citing *People v. Valencia*, 43 Cal. 552. It is obvious that no others could have been referred to, except such as defined murder in its two degrees.

The point decided in the case cited was, that where on a trial for murder two parts of the charge of the court to the jury as to what constitutes murder are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed.

No such condition of the instructions exists here.

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

A petition to have this cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on July 21, 1905.

[No. 24. First Appellate District.—May 25, 1905.]

In the Matter of the Estate of LISETTE CHESNEY,
Deceased. MRS. S. DALLMANN, Respondent, v. J. J.
FRANK et al., Appellants.

ESTATES OF DECEASED PERSONS—DISTRIBUTION OF LEGACY—COLLATERAL INHERITANCE TAX.—Upon petition by a legatee for distribution of the amount of the legacy, in determining the amount of money in the hands of the executors, the court was only required to deduct the collateral inheritance tax upon the legacy, and was not re-

quired to take into consideration the whole amount of the collateral inheritance tax upon the several bequests. Such tax is not a unit; but is imposed upon the several amounts of the decedent's estate to which the successors thereto are respectively entitled; and it is to be assumed that other beneficiaries before receiving their shares had paid or deducted the amount of the tax upon their respective gifts.

Id.—PROPRIETY OF ORDER—DISPENSING WITH BOND.—Where it appeared at the hearing that all allowed debts had been paid and all other legacies had been paid, and that the executors had in their hands a sum much in excess of the petitioner's legacy, and that an action was pending upon a rejected claim for a comparatively small sum, the court did not err in directing the payment of the legacy and dispensing with a bond.

Id.—QUESTIONS OF FACT—EXTENT OF INDEBTEDNESS.—The questions whether the estate is but little indebted, or the payment can be made without loss to the creditors, are questions of fact to be determined by the court upon a comparison of the value of the estate with the amount of the debts.

Id.—ACTION UPON REJECTED CLAIM OF PETITIONER.—The fact that a claim presented by the petitioner against the estate had been rejected, and that a suit thereon was pending, did not preclude the court from making the order for payment of her legacy any more than would a suit upon a rejected claim of any other person; and where it appears that the executors still have in their hands property belonging to the estate many times in value of the amount of the rejected claim, if adjudged valid, it cannot be said that the court decided erroneously.

Id.—AMOUNT REQUIRED TO ERECT TOMBSTONES.—The court was not required to take into consideration the amount required for erecting tombstones authorized by the will where it appears that if the money on hand is insufficient, after other payments are made, resort may be had to sufficient real estate. The petitioner was not required to await such expenditure before being entitled to receive her legacy.

APPEAL from an order of the Superior Court of the City and County of San Francisco distributing the amount of a legacy. F. H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Lucius L. Solomons, for Appellants.

E. A. Bridgford, and Hudson Grant, for Respondent.

HARRISON, P. J.—By the last will and testament of the above-named decedents she bequeathed to the respondent the

sum of five hundred dollars. After the expiration of more than one year from the issuance of letters testamentary the respondent presented to the superior court her petition for a distribution to her of the said legacy. In her petition she alleged that the court had made a decree establishing due notice to the creditors of said estate, and that the time for the presentation of claims had expired, and that all claims that had been presented to and allowed by the executors had been fully paid; that a claim against the said estate for \$915 had been presented by her and rejected by the executors, and that an action thereon was still pending and undetermined; that the estate was indebted to no one but herself, and to her only upon her said claim. She also alleged that it appeared from the inventory of the estate filed by the executors that its value exceeded fifteen thousand dollars, and that they had filed an account showing that after reserving a sum sufficient to pay her said claim, in case she should recover thereon, there would remain in their hands a balance of upwards of three thousand dollars for distribution to the persons entitled thereto, and that the legacy to her could be paid without any loss to the creditors of the estate. The executors filed an answer to her petition; and upon the hearing thereon the court found that all of its allegations were true, and entered an order directing the executors to make the payment asked for by the respondent, and dispensed with the execution of any bond on her behalf. From this order the executors have appealed; and in support of their appeal contend that it sufficiently appeared at the hearing that they did not have in their hands sufficient money with which to pay to the respondent the amount of her legacy; and that the court erred in not requiring her to execute the bond named in section 1663 of the Code of Civil Procedure.

In their answer to the respondent's petition the executors set forth as a defense thereto that the decedent had made other bequests of equal rank with that of the respondent, which, with the interest thereon, amounted to about two thousand dollars; that the estate in their hands was subject to a collateral inheritance tax upon the several bequests, amounting to \$729.38; and that the testatrix had directed them to erect suitable tombstones over the graves of herself and her deceased husband, which they estimated would cost

two hundred dollars. At the hearing it was shown, from the last account filed by the executors, that they then had in their hands \$3,044.86 in money, and also real estate valued at over seven thousand dollars; and that out of said money all of the legacies except that of the respondent had been paid since the filing of said account. It was not shown that the executors had disposed of any other portion of the estate. It thus appeared that they had in their hands a sum of money much in excess of the respondent's legacy, and the court did not therefore err in directing its payment.

In determining the amount of money in the hands of the executors available for the payment of the respondent's legacy, the court was not required to take into consideration the amount of the collateral inheritance tax. Such tax is not one of the expenses of administration or a charge upon the general estate of the decedent, but is in the nature of an impost tax or tax upon the right of succession (*Estate of Wülmerding*, 117 Cal. 281, [49 Pac. 181], and is imposed upon the several amounts of the decedent's estate to which the successors thereto are respectively entitled. (*Estate of Wülmerding*, 117 Cal. 281, [49 Pac. 181]; *Estate of Hoffman*, 143 N. Y. 327, [38 N. E. 311].) "The tax is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests in which it is divided by the will or by the statute laws of the state, and is a charge against each share or interest according to its value and against the person entitled thereto." (*Matter of Westurn*, 152 N. Y. 93, [46 N. E. 315]. See, also, *Knowlton v. Moore*, 178 U. S. 41, [20 Sup. Ct. 747].)

The court followed this rule in the present case, and in fixing the amount to be paid respondent deducted from the legacy given to her the amount of the tax thereon, and it is to be assumed that before paying or delivering to the other beneficiaries under the will any property given to them by the testatrix the executors either deducted therefrom or collected from the said beneficiaries the amount of the tax upon their respective gifts.

Nether did the court err in dispensing with a bond on the part of the respondent. The fact that a claim presented by her against the estate had been rejected by the executors, and

that a suit thereon was pending, did not preclude the court from making an order for the payment of her legacy any more than would a suit upon a rejected claim of any other person. Section 1663 of the Code of Civil Procedure authorizes the court to grant the petition of *any* legatee for the payment of his legacy if it appear at the hearing that the estate "is but little indebted," and that the payment can be made "without loss to the creditors of the estate," and to dispense with a bond from the petitioner if "the time for presenting claims has expired, and all claims that have been allowed have been paid, . . . and the court is satisfied that no injury can result to the estate." Whether an estate is "but little indebted" or the payment can be made "without loss to the creditors" are questions of fact to be determined by the court upon a comparison of the value of the estate with the amount of the debts (*Estate of Crocker*, 105 Cal. 368), and we cannot say that it appears from the record herein that the court made an erroneous decision upon these questions. It is not claimed that there is any indebtedness against the estate other than this claim of the respondent, and the executors still have in their hands property belonging to the estate many times in value the amount of the rejected claim with which to pay the same if it shall be adjudged valid.

Upon the same principles the court was not required to take into consideration the amount that may be required for erecting tombstones authorized by the will. If the moneys in the hands of the executors, after making the other payments, shall be insufficient therefor, they can resort to the realty. The respondent is not required to await such expenditure before being entitled to receive her legacy.

The order appealed from is affirmed.

Cooper, J., and Hall, J., concurred.

[No. 35. First Appellate District.—May 26, 1905.]

In the Matter of the Estate of JACKSON SYLVAR, Deceased. CITY BANK and CITY SAVINGS BANK, Appellants, v. JOSEPH L. ENOS, Administrator, Respondent.

ESTATES OF DECEASED PERSONS—ACCOUNTS OF ADMINISTRATOR—NEGLECT IN SETTLEMENT OF ESTATE—PRESUMPTIONS—BURDEN OF PROOF.—

Upon the settlement of the third annual account of an administrator, where the administrator is sought by creditors to be charged with neglect for an unreasonable time to have the money on hand distributed or paid to creditors, and his letters are sought to be revoked, where it does not appear that the administrator has willfully or negligently caused the delay, and there was litigation, which went to the supreme court, and no disobedience appears to the orders of the court, all presumptions are in favor of the regularity of the management of the estate by the administrator; and the burden is on the contesting creditors to prove the negligence alleged.

ID.—DEPOSIT OF MONEY WITH INDIVIDUAL.—The mere deposit of money by the administrator with an individual, who used it to some extent in his business, is not ground for removal or penalty where it does not appear that the administrator consented or was privy to such use and the administrator used no part of the money nor received anything for its use.

ID.—CHARGE FOR INTEREST NOT INCLUDED IN GROUNDS OF CONTEST.—Where a charge for interest against the administrator was not included in the grounds of contest against the account by the creditors, it cannot be considered. Such charge, either as a penalty for delay in settling the estate, or for deposit of the money with an individual, is not included in a specification that the administrator "has not accounted for all the estate which has come to his possession."

ID.—DUTY OF COURT TO ORDER PAYMENT OF DEBTS.—Where the account shows money on hand, it is the duty of the court to order the payment of the debts, as circumstances may require; and it was error for the court to deny such order to the extent that the funds on hand would justify.

APPEAL from orders of the Superior Court of Santa Cruz County settling the third annual account of an administrator and refusing to revoke letters of administration. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Charles B. Younger, Jr., for Appellants.

Lindsay & Cassin, for Respondent.

COOPER, J.—Two appeals from orders of the superior court are brought up in this record; the one from an order settling the third account of the administrator, and the other from an order refusing to revoke the letters of administration.

The account purported to give a detailed and itemized statement of all sums received and of all amounts paid out during the period covered by it. This account was contested by appellants, creditors of the estate, who filed their objections in writing to "each and every item of disbursements therein contained, except the items of taxes, upon each of the following grounds, to wit:—

"1. That in rendering said account said administrator did not produce or file vouchers therefor.

"2. That said administrator did not pay the same.

"3. That such item is not an expense of administration of said estate.

"4. That the charge thereof is excessive and more than the reasonable value thereof.

"5. That such item is not a proper or legal charge.

"6. That such item is not a necessary expense of administration.

"7. That said administrator has not accounted for all the estate of said deceased which has come to his possession."

The bill of exceptions shows that upon the hearing "each and every item set forth in said account was proven by competent testimony to be true, with the exception of those items the consideration of which has been continued until the hearing of the final account in said matter."

Appellants do not now attempt to attack any item in the account, nor do they claim that the finding as to any item is unsupported by the evidence.

The main contention is, that the administrator has neglected for an unreasonable time to have the money on hand distributed or paid to the creditors, and that he deposited the money on hand with one Hoffman, who mingled it with his own and used it to some extent in his own business. In regard to the delay, while it is true the estate has

been pending several years, there is nothing in the record to show that the administrator has willfully or negligently caused the delay. There are many cases in which the settlement of estates is unavoidably delayed, without the fault of the administrator. In this case it appears that there was litigation which went to the supreme court. In all cases where the administrator is called upon to pay the penalty of his neglect by being charged with interest or by removal from his trust, it is incumbent upon the party alleging such neglect to prove it. All presumptions are in favor of the regularity of the management of the estate by the administrator. Here the administrator appears to have paid a dividend to the creditors as ordered by the court; and to have obeyed all orders of the court in the estate. The account filed is the third account, and each and every item was found to be correct. There was still on hand undisposed of at the time of the hearing in the court below property of the appraised value of \$2,750.

In regard to the money having been deposited with, and to some extent used by, Hoffman, it does not appear that the administrator consented to, or was in any way privy to such use. The administrator never used any of the money himself nor received anything for its use. We are not prepared to say that an administrator may not deposit the funds of the estate with a private banker or with an individual. In many cases it would be the safer course to do so. But, aside from this, a conclusive answer to appellants' claim that the administrator should be charged with interest, is the fact that no such claim is stated in the written grounds of contest. The code provides (Code Civ. Proc., sec. 1635): "On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same." The object of the section is that an issue shall be made in the trial court as to the items contested, or with which it is sought to charge the administrator. It was intended that the administrator should know the items contested or the matters in regard to which he is claimed to have been delinquent, so that he may come into court with his evidence prepared to meet or explain any exception taken to his account. The issues are thus made by

the verified account and the written exceptions filed to it. The method is simple, and designed to save the time of the court being taken up by uncontested matters.

In the *Estate of More*, 121 Cal. 639, [54 Pac. 148], the same view was taken, and it was there said the person desiring to contest the account of an executor or administrator "must file his exceptions in writing to the account, setting out specifically the grounds of his objections, and at the hearing he should be held limited to the exceptions so presented."

Appellants contend that the claim that the administrator should be charged with interest is supported by the statement "that said administrator has not accounted for all the estate of said deceased which has come to his possession."

Under the most liberal rules of pleading we could not hold that a penalty for delay in settling an estate, or interest allowed as a penalty for depositing the money with Hoffman, is "estate which has come to his possession." The administrator has received no interest, profit, or income from the estate. It has been said that in the absence of exceptions the court may inquire into any matter in the settlement of an account which may seem objectionable, and may pass judgment thereon; but such rule does not apply to any matter by which it is sought to impose a penalty upon the administrator, nor to cases where the parties have appeared and made their objections in writing, as they did in this case.

The law provides (Code Civ. Proc., sec. 1647) that "Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require."

The section evidently makes it the duty of the court, when there is money on hand, to make an order for the payment of the debts. If there are not sufficient funds on hand with which to pay the debts the court must specify in the decree the sum to be paid to each creditor. Here the account shows a balance of cash on hand of \$6,757.47. The court refused to make an order for the payment of the debts of the estate, but made an order directing the administrator "to close the said estate and have the proceeds thereof distributed among the creditors at the earliest possible date." Petitioners were creditors in a large amount, and asked for an order to the

administrator for the payment of the debts of the estate. They were entitled to such order, or to an order directing a dividend to the extent that the funds on hand would justify.

The order refusing to revoke the letters of administration was correct for the reasons herein stated in discussing the appeal from the order allowing the account. A further separate discussion of the latter order would serve no useful purpose.

The order, in as far as it settles the account, is affirmed. The order, as to a distribution of the unsold estate and denying a dividend to the creditors, is reversed, and the court directed to amend and modify its order so as to direct a dividend to the creditors in accordance with the views herein expressed.

The order refusing to revoke the letters of administration is affirmed.

Appellants are entitled to their costs on this appeal.

Hall, J., and Harrison, P. J., concurred.

[Crim. No. 11. Second Appellate District.—May 27, 1905.]

Ex Parte WILLIAM CHILDS, on Habeas Corpus.

HABEAS CORPUS—VIOLATION OF COUNTY ORDINANCE—SUFFICIENCY OF COMPLAINT.—A complaint charging a defendant with the violation of a county ordinance for selling liquors at retail without a license does not fail to state an offense merely because it does not set forth the ordinance in full, but refers to it by its title and the sections violated, and gives the date of its passage; and a writ of *habeas corpus* will not be granted on that ground.

ID.—CONSTRUCTION OF CODE—ORDINANCE A PRIVATE STATUTE—PLEADING—JUDICIAL NOTICE.—A county or municipal ordinance is a private statute within the meaning of section 963 of the Penal Code, allowing a criminal pleading to refer to such statute by its title and the day of its passage, and requiring the court to take judicial notice thereof.

APPLICATION for Writ of Habeas Corpus.

The facts are stated in the opinion of the court.

M. C. Munday, and Munday & Redd, for Petitioner.

E. J. Fleming, District Attorney of Los Angeles County,
for Respondent.

GRAY, P. J.—This application for a writ of *habeas corpus* is based on the ground that the complaint on which Childs was convicted and sentenced to a term in jail on a plea of guilty fails to state a public offense.

The complaint in question charges "that on the seventh day of April, 1905, near Burbank (outside the limits of incorporated cities and towns), and in the county of Los Angeles, state of California, a misdemeanor was committed by William Childs, who at the time and place last aforesaid, did willfully and unlawfully engage in, conduct and carry on a retail establishment, by then and there selling, serving and giving away spirituous, vinous, malt and mixed liquors in quantities less than one fifth of a gallon, and by the drink and glass, and to be drunk upon the premises where sold, without first having secured a license so to do, contrary to the ordinance of the county of Los Angeles entitled 'Ordinance imposing licenses and fixing rates thereof in the county of Los Angeles, state of California,' as passed, adopted and approved by the board of supervisors of said Los Angeles county on the twentieth day of January, 1903, and particularly sections one, three and sixteen of said ordinance; and against the peace and dignity of the people of the state of California."

It is urged by petitioner that the ordinance or the part of it defining the offense with which it is sought to charge the defendant should have been set out, and that the complaint failing of this it does not contain a charge of a public offense. The validity of the ordinance is not in any way questioned. The point made goes only to the sufficiency of the complaint as a pleading, the claim in substance being that the complaint is uncertain and not sufficiently specific in its allegations as to this ordinance. No claim is made that the acts charged to have been done by the defendant do not constitute the crime denounced by the ordinance. We do not think that the insufficiency of a pleading in the respect claimed herein can be declared on *habeas corpus*, even if it were so insufficient.

But it is not insufficient in the respect claimed. It is not necessary in pleading a county ordinance to set out its substance, or any part of its substance. Much less is it necessary to copy any part of it into a criminal pleading. Section 963 of the Penal Code reads as follows:—

“In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof.”

The ordinance under which the complaint is drawn is a municipal ordinance and a private statute within the meaning of the above section. Its title and the day of its passage is set out in the complaint, and the court will, therefore, take judicial notice of it, just as it takes judicial notice of a statute of the state defining a crime. (*Ex parte Davis*, 115 Cal. 447. [47 Pac. 258]; *City of Tulare v. Hevren*, 126 Cal. 229, [58 Pac. 530].)

Looking at the acts charged in the complaint, it can be seen that they are the acts denounced in the ordinance as a crime and made punishable thereby.

There is no ground for the issuance of the writ. Let the petition be dismissed.

Smith, J., and Allen, J., concurred.

[Crim. No. 2. Second Appellate District.—May 29, 1905.]

THE PEOPLE, Respondent, v. DAVID B. BRADFORD,
Appellant.

CRIMINAL LAW—LEWD OR LASCIVIOUS ACTS—CONSTRUCTION OF PENAL CODE—CORRECTION OF MANIFEST MISPRISION.—The reference to “part II” in section 288 of the Penal Code, making it an offense to commit any lewd or lascivious act “other than the acts provided for in part II of this code,” is manifestly a legislative oversight or clerical misprision, the true reference being to “part I.” The erroneous reference will be deemed corrected under the rules of statutory construction, thus rendering the section intelligible and certain.

Id.—LASCIVIOUS ACTS UPON INFANT GIRL—COMPETENCY OF WITNESS—DISCRETION OF COURT.—Whether or not the infant girl upon whose

body the lascivious acts were charged to have been committed was an incompetent witness on account of her age was a question within the discretion of the court; and where the court determined that she was a competent witness, the weight and effect of her testimony was properly left to the jury.

ID.—PROOF OF CORPUS DELICTI.—The *corpus delicti* was sufficiently proved by the testimony of the child with the corroborating testimony.

ID.—TESTIMONY OF FATHER—CHARACTERISTICS OF CHILD—DEFENDANT NOT PREJUDICED.—Though the testimony of the father in relation to the characteristics of the child in respect to education, obedience, pleasure, love for pictures, and timidity with strangers might well have been omitted, no prejudicial error appears in its admission.

ID.—PROOF OF VENUE.—Though no witness testified in terms that the offense was committed within the county, yet the venue was sufficiently proved where there was evidence that it was committed within a specified township which was a legal subdivision of the county, and where the whole evidence left no reasonable doubt that the offense was committed in the county.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Curtis & Curtis, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

ALLEN, J.—The defendant was charged with the offense defined in section 288 of the Penal Code, convicted thereof, and sentenced to five years in the state prison. He appeals from the judgment and from an order denying a new trial.

Defendant contends on this appeal that section 288 of the Penal Code, which provides that "Any person who shall willfully and lewdly commit any lewd or lascivious act, *other than the acts constituting other crimes provided for in part II of this code,*" etc., is unintelligible in that part II of the code referred to relates solely to criminal procedure and in no way describes acts constituting other crimes, and that where a new offense is sought to be created by a section of the code it should have greater certainty in its terms. It is

true that in part I, and not in part II, of the Penal Code is to be found the statement of the acts constituting other crimes; it is evident that either by legislative oversight or by clerical misprision the characters "II" were inserted for the character "I" in such section, and that section 288 should be so construed. Such construction is warranted by the decision of our supreme court in *California Loan Co. v. Weis*, 118 Cal. 497, [50 Pac. 697], wherein it was held that the word "June" was inserted, either by legislative oversight or clerical error, where "July" was intended, such construction being necessary to give effect to the plain intent of the legislature as deduced from the whole act then under consideration. The rules of statutory construction embrace also the correction of clerical errors by the insertion of the true word or words (*County of Lancaster v. Frey*, 128 Pa. St. 593, [18 Atl. 478], cited in *California Loan Co. v. Weis*, 118 Cal. 497, [50 Pac. 497].) Under this construction section 288 is intelligible and certain.

It is further contended that the court erred in overruling defendant's objection to the competency as a witness of the infant upon whose body the acts were charged to have been committed, as well as in refusing to strike out her testimony after the same had been given. We perceive no error in either ruling. Whether or not she was an incompetent witness on account of her age was a question within the discretion of the court. (Code Civ. Proc., sec. 1880; *People v. Stouter*, 142 Cal. 151, [75 Pac. 780].) The court having determined that she was a competent witness, the weight and effect of her testimony was properly left to the jury. The testimony of the child, with the corroborating testimony, sufficiently proves the *corpus delicti*. The testimony of the father in relation to the education and obedience of the child, and her characteristics as to pleasure, in her love for pictures, her traits as to boldness or timidity with strangers, might well have been omitted, but no prejudicial error is apparent in its admission.

The venue was sufficiently proven. While no witness testified in words that the offense was committed in San Bernardino County, it does appear that it was committed in the township of Ontario, which is a legal subdivision of San Bernardino County, California, and the whole testimony,

taken together, leave no room for a reasonable doubt that the offense was committed in the county. (*People v. Manning*, 48 Cal. 338.)

Judgment and order affirmed.

Gray, P. J., and Smith, J., concurred.

[Crim. No. 1. First Appellate District.—May 29, 1905.]

THE PEOPLE, Respondent, v. WILLIAM NOON, Appellant.

CRIMINAL LAW—BURGLARY—INTENT TO COMMIT LARCENY—SUFFICIENCY OF EVIDENCE.—*Held*, that, considering the time of the entry, the clandestine manner thereof, and the precipitate flight of the defendant, though no larceny was committed, the jury were justified in finding that the entry was with the intent to commit larceny.

ID.—MUTILATION OF INFORMATION—MISSING PAGE—CONTENTS NOT PROVEN—NEW TRIAL.—Where it appears at the arraignment of the defendant that the original information contained one page more than the copy furnished the defendant, objection to which was waived, and before testimony was given it appeared that the original had been mutilated by removing a page therefrom, and no evidence was given on the hearing of objections thereto as to what the missing page contained, it cannot be said that it did not contain matter of defense or modifying the charges; and a new trial must be granted to supply proof as to its contents.

ID.—PRESUMPTION AS TO KNOWLEDGE OF DISTRICT ATTORNEY.—As the information was signed by the district attorney and was presumably drafted by some one connected with his office, the proof of the contents of the missing page may be presumed to have been peculiarly within the knowledge of the district attorney.

ID.—JURISDICTION OF COURT ON NEW TRIAL—EFFECT OF MISSING PAGE.—The jurisdiction of the court to retry the defendant cannot be affected if it should appear that the missing page was removed by some unknown person or was accidentally detached, and if it be shown that the matter removed does not affect what remains or is of such a nature that defendant would not be prejudiced by its removal.

ID.—CHARGE OF PRIOR CONVICTION—DISMISSAL.—If it be clearly shown that the missing page contained an additional charge of prior conviction, such charge may be dismissed, and the trial may then proceed on the information as it now stands.

IN.—PRACTICE—CHARGES OF PRIOR CONVICTION—RECORD.—Where the charges of a prior conviction are admitted, the proper place to show the same is in the minutes of the plea, a copy of which should be inserted in the judgment-roll; and error appears where the minutes of the plea show only the general plea of not guilty, and the jury did not return any finding upon the charge of prior conviction, although the judgment recites a conviction of five such charges.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

H. Krouse, and A. S. Newburgh, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

HALL, J.—This is an appeal by the defendant in a criminal action from an order denying his motion for a new trial and from the judgment of imprisonment in the state prison for the term of twenty years.

The information charges the defendant with burglary, together with several prior convictions. The entry is alleged to have been of the "house, room, etc., of one C. Heuser, located at 503 Mason Street," etc.

It is urged by appellant that the evidence was insufficient to justify a finding of an entry of the premises by the defendant, or that such entry was with the intent to commit larceny. A careful examination of the evidence set forth in the bill of exceptions does not in our opinion sustain the contention of defendant in this regard. C. Heuser, the occupant of the room alleged to have been entered, testified in substance, among other things, that he left his room at 503 Mason Street at eleven o'clock in the forenoon of the twentieth day of January; that he did not light the gas at all that morning; that he returned to the room at a quarter to one in the night and found the room in the same condition as when he left it; nothing was disturbed. His room was the back room on the second story.

Edward Asher, who, according to the evidence, resided in the same house in a room immediately under Heuser's room, testified that on the night in question he heard a noise, and,

continuing, said: "I didn't pay particular attention at first. I heard the window upstairs open. It came down with a bang. I heard somebody walking. I jumped up and ran upstairs. I knew Mr. Heuser never came home at that time. I knew where he was employed. I went upstairs immediately. I heard walking quickly around. I started to open the door, and I said 'Who is there?' and just as I said that 'bang' went the window. Then I ran into the bathroom and I said, 'What is the matter down there?' and I did not receive any response, and just then there was a crash." He further testified that after getting a pass-key, and entering the room, he found nothing disturbed except that the gas was lighted.

Josephine La Fargue testified that she occupied the adjoining house, which was separated by a court from 503 Mason Street, the court being at the rear of 503 Mason Street. On the night in question she heard a noise and saw defendant in her house. He ran out of the house, but left an overcoat. She further testified that when she went to bed that night a step-ladder was against the house of 503 Mason Street. It was then unbroken, but when she saw it next morning it was broken.

The arresting officer testified that after the arrest of the defendant he said to the officer: "You can't convict me of burglary because I did not take anything out of that room."

From the foregoing statement of the evidence it is a fair deduction that the defendant did enter the room of Mr. Heuser, and on being interrupted escaped through the window into the court, and thence fled through the adjoining house.

Considering the time of the entry, the clandestine manner thereof, and the precipitate flight of the defendant, the jury were justified in finding that the entry was with the intent to commit larceny.

A more serious objection to the action of the trial court arises out of the following state of facts: Upon the arraignment of the defendant it was discovered that the original information contained one page more than the copy furnished the defendant. This irregularity, however, was at the time waived by the defendant. Defendant pleaded not guilty,

with privilege to withdraw plea. At the trial, after the jury had been sworn, the clerk read to the jury the information as the same now appears in the judgment-roll, omitting to read the prior convictions therein charged, and stated the plea of not guilty on behalf of the defendant thereto. A witness was called for the prosecution and sworn, but before any testimony was given defendant's counsel called the attention of the court to the fact that the information that had just been read contained one page less than the information on file at the arraignment, and on which defendant had been arraigned, and in effect objected to the defendant being tried on the mutilated information. The court thereupon took testimony as to the alteration in the information, and overruled the objection, and the defendant excepted. The objection was in substance repeated upon the first question being put to the witness, and was overruled and exception reserved.

The testimony taken on the hearing of the objection shows that a page of the original information containing printed and written matter had been removed, or had become detached, and was missing at the trial. No evidence was given on the hearing of the objection as to what the missing page contained. The clerk of the court, the deputy district attorney, the judge of the court, and counsel for defendant each testified, but no effort was made to prove the contents of the missing page, or to contradict the testimony that a page was missing. In the remarks made by the court in ruling on the objection, the court seems to have assumed that the missing page contained only a charge of a prior conviction.

Before judgment was rendered the same matter was again presented to the court upon a motion in arrest of judgment, and testimony was again taken. On this hearing the clerk did testify that the missing page contained a charge of prior conviction, but that it might have contained something else. No effort was made to prove the precise contents of the missing page. The entry in the clerk's register under date of February 26, 1904, is as follows: "Information for felony, to wit, burglary, and five prior convictions, presented by the district attorney and filed"; while the information now in the judgment-roll, from which confessedly one page is missing, still contains five charges of prior conviction. The

fair inference from this is, that the missing page contained something else than a charge of prior conviction.

However this may be, it certainly nowhere appears in the record that the missing page contained *only* a charge of prior conviction. As the information was signed by the district attorney, and was presumably drafted by some one connected with his office, the proof of the contents of the missing page may well be presumed to have been peculiarly within the power of the district attorney.

If it had been clearly shown that the missing page contained only a sixth charge of prior conviction, we are of opinion that defendant could not have been injured or prejudiced by the removal of such charge from the information. Indeed, counsel for defendant in his brief concedes this to be so, and cites us in that connection to *People v. Carroll*, 92 Cal. 568, [28 Pac. 600], in which case the defendants, together with one John Murphy, were charged in the information with the crime of robbery. The court said: "It appears that afterwards the information was withdrawn as against Murphy, and that some one connected with the court erased the words 'and John Murphy' and the word 'and' where it occurred in another place, by drawing a black line through the same. This was certainly an unauthorized and dangerous act; and if it did not appear clearly what the alterations were, and that they could not have prejudiced or injured appellant, the consequence might have been serious. But as the alterations clearly appear, and as they could not 'have actually prejudiced defendants or tended to their prejudice in respect to a substantial right,' they are not good grounds for a reversal of the judgment, no matter how censurable the act of making them. We hope, however, that this case will not be taken as a precedent for similar conduct hereafter."

In this case, as it does not clearly appear what the missing page contained, we cannot say that it did not contain matter that would have been a defense or a material modification of the main charge. For this reason the judgment and order denying the motion for a new trial must be reversed.

We are asked by counsel for the defendant not only to reverse the judgment in this case, but also to order the information dismissed, upon the theory that the information

having been altered no new trial can be had thereon, and he cites us to *Calvin v. State*, 25 Tex. 789, and *Ex parte Bain*, 121 U. S. 1, [7 Sup. Ct. 781].

Calvin v. State was an indictment by the grand jury for murder, which, by agreement of counsel, was amended by striking therefrom certain words which went to the description and identification of the person killed. Manifestly an indictment emanating from the grand jury cannot be amended in matter of substance by either the court or the district attorney. It was consequently held in this case that all proceedings under the indictment must be annulled and the prisoner held to answer to the next grand jury. The court did say, however: "We do not believe that every accidental or intentional mutilation or partial obliteration of an indictment would have the effect to destroy its vitality, because this would be to place the power of the courts to punish offenses too much at the mercy of reckless and unscrupulous men."

In accord with the foregoing quotation, we say we cannot believe that a court can be deprived of the jurisdiction to try a defendant because some portion of an information be removed from the document by some unknown person, or perhaps accidentally detached and lost, especially if it be shown that the matter removed does not in any way affect what remains or be of such a nature that defendant could not be prejudiced by its removal.

Ex parte Bain was also an indictment by a grand jury which had been changed by order of the court in a matter of substance that went to the description of the particular offense charged, and the prisoner was discharged on a writ of *habeas corpus*.

In the case of *People v. Granice*, 50 Cal. 447, where it was conceded that certain words were interpolated in an indictment for manslaughter so as to change the charge to one for murder, the court reversed the judgment and remanded the cause for a new trial. So in *People v. Carroll*, 92 Cal. 568, [28 Pac. 600], where it clearly appeared what the alteration was, and that it could not have prejudiced the defendant, the irregularity was held not to warrant a reversal.

Upon the return of this case to the trial court, if it clearly appear that the missing page contained only a charge of a

prior conviction, no reason is perceived why such charge may not be dismissed or withdrawn, and the trial then proceed on the information as it now stands.

At the oral argument our attention was also called to the fact that the minutes of the plea show only the general plea of "Not guilty." Neither do the "minutes of the court" contained in the judgment-roll show that the charge of prior convictions was admitted; nor did the jury return any finding as to the charge of prior convictions, although the judgment recites a conviction of five such charges. If in fact the defendant did admit the charge of prior convictions, the proper place to show the same is in the minutes of the plea, a copy of which should be inserted in the judgment-roll. (Pen. Code, sec. 1207.)

However, it is not necessary to discuss the effect of this error, as a new trial must be had for the reasons hereinbefore set forth, and we only call attention to this matter in order that it may be corrected when the case is again before the trial court.

Judgment and order denying motion for a new trial are reversed and cause remanded for new trial.

Cooper, J., and Harrison, P. J., concurred.

[Crim. No. 7. Third Appellate District.—May 29, 1905.]

THE PEOPLE, Appellant, v. WILLIAM CLEARY, Respondent.

CRIMINAL LAW—ROBBERY—INSUFFICIENT INDICTMENT—OWNERSHIP NOT ALLEGED—CONVICTION OF GRAND LARCENY—ARREST OF JUDGMENT.—An indictment charging the crime of robbery in taking money from the person of another forcibly against his consent, which does not allege the ownership of the money taken in some person other than the defendant is insufficient, and will entitle the defendant convicted thereunder of grand larceny to an arrest of judgment.

ID.—PRESUMPTION OF OWNERSHIP FROM POSSESSION—INDICTMENT NOT AIDED.—The presumption of ownership from possession, if uncontradicted, is accepted as matter of proof; but, as matter of pleading, an indictment cannot be aided in any case by presumption.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, E. B. Power, Deputy Attorney-General, and T. T. C. Gregory, District Attorney, for Appellant.

George A. Lamont, and M. C. Chapman, for Respondent.

McYAUGHLIN, J.—Respondent was indicted by the grand jury of Solano County for the crime of robbery and found guilty of grand larceny.

On the day fixed for pronouncing judgment, he made his motion in arrest of judgment upon the grounds: "That it appears upon the face of the indictment on which said defendant was tried and convicted, that the facts stated therein do not constitute the public offense of grand larceny or any other public offense. For the reason that said indictment does not charge that the property taken was not the property of the defendant, or was the property of any person other than the defendant."

The motion was granted, and thereupon this appeal was taken.

It is thus apparent that the sole question here is the sufficiency of said indictment to sustain a conviction of grand larceny.

The part of said indictment pertinent to this inquiry reads as follows: "The said William Cleary, . . . willfully, unlawfully and feloniously, did take from the person and possession of one Peter Cadloni seventy dollars in gold and silver coin of the United States of America, which said taking of said lawful money aforesaid, was then and there without the consent and will, and was then and there, against the will of said Peter Cadloni, and was then and there accomplished by means of force used upon and against the said Peter Cadloni, by said William Cleary."

"Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of *another*," and unless it can be said that the indictment in this case charges that the property taken was owned by some other person than

the defendant, the action of the court below must be sustained.

In *People v. Hanselman*, 76 Cal. 461,¹ [18 Pac. 425], it was said: "Under all definitions of larceny found in the books, the ownership of the property averred to have been stolen in some other person than the one charged with stealing it is an essential element of the crime. The code of this state provides that it must be the property 'of another.' And all the authorities are concurrent to the point that this essential part of the crime must be stated in the indictment. To disregard this firmly fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation."

Counsel for appellant concedes that this is the rule, but contends that it being alleged that the property was taken from the possession of Cadloni, it follows that this must be taken as an averment of Cadloni's ownership.

In support of this contention section 1963 (subd. 11) of the Code of Civil Procedure is cited.

The presumption "That things which a person possesses are owned by him," if uncontradicted, is accepted as *proof*, but we are here dealing with a *pleading*, and "In no case can an indictment be aided by presumption." (*People v. Terrill*, 127 Cal. 100, [59 Pac. 836]; *People v. Robles*, 117 Cal. 684, [49 Pac. 1042].)

People v. Nelson, 56 Cal. 77, and *People v. Anderson*, 80 Cal. 206, [22 Pac. 139], merely dealt with such presumption as *proof*, for in both cases the ownership of the property is distinctly averred.

People v. Price, 143 Cal. 353, [77 Pac. 73], has no application to the case at bar.

In *People v. Hicks*, 66 Cal. 104, [4 Pac. 1093], there is no hint that the mere averment of possession carries with it an averment of ownership.

The language there used will bear the construction that the property taken was the personal property of Frederick Schwartz, and in his possession, and this construction being adopted, there was a sufficient averment of ownership in another.

This is pointedly shown by two cases in which *People v.*

Hicks was cited. (*People v. Hanselman*, 76 Cal. 461,¹ [18 Pac. 425]; *People v. Ammerman*, 118 Cal. 26, [50 Pac. 15].)

In the latter case it was contended that the offense was described in the language of the statute defining robbery, but the court held that this was not sufficient, and that a *distinct averment of ownership was necessary*. Now, robbery is the felonious taking of personal property from the *possession* of another, and if the averment of possession carried an averment of ownership, then certainly nothing more could be requisite. And yet for forty years it has been the rule that in addition to this an averment of *ownership* is necessary. (*People v. Vice*, 21 Cal. 346; *People v. Ammerman*, 118 Cal. 26, [50 Pac. 15]; *People v. Piggott*, 126 Cal. 509, [59 Pac. 31]; *People v. Nelson*, 56 Cal. 80; *People v. Jones*, 53 Cal. 59.)

If it need only be stated that the property taken was in the possession of another, then in reason, as well as under the authorities, it need only be alleged that the taking was from the person of another. For it would thus appear that the taking was from one having possession. (*People v. Shuler*, 28 Cal. 493; *People v. Ah Sing*, 95 Cal. 655, [30 Pac. 796]; *People v. Walbridge*, 123 Cal. 274, [55 Pac. 902].)

This construction would emasculate section 484 of the Penal Code, and be judicial legislation denounced as usurpation in *People v. Hanselman*, 76 Cal. 461,¹ [18 Pac. 425].

It would necessarily lead to a *reductio ad absurdum*, abhorred in law and logic.

The order is affirmed.

Chipman, P. J., and Buckles, J., concurred.

¹ 19 Am. St. Rep. 238.

[No. 10. Third Appellate District.—May 29, 1905.]

A. BOYER, Appellant, v. **PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA**, **PHILIP BRUNER**, **ROSELLE BRUNER**, his Wife, and **J. O. B. GUNN**, Respondents.

EJECTMENT—TITLE UNDER FORECLOSURE—PUBLICATION OF SUMMONS—EVIDENCE—JUDGMENT-ROLL—AFFIDAVIT AND ORDER NOT INCLUDED.—In an action of ejectment, where judgment was rendered for defendant under title acquired through foreclosure of a mortgage upon publication of summons against the owner of the mortgaged property in the year 1894, the admission in evidence of the judgment-roll as such by the court did not include the admission of the inadmissible affidavit and order for publication, though wrongfully attached to the judgment-roll by the clerk and offered by the defendant, and not objected to by the plaintiff; and no defect in the affidavit and order can be considered.

ID.—DUTY OF COURT AS TO EVIDENCE.—The duty of the court is not confined to passing upon such evidence as may be objected or excepted to, but extends to the preservation of the rights of litigants and a proper disposition of the matter in controversy.

ID.—PUBLICATION AFTER RETURN OF SUMMONS—PRESUMPTION AS TO ALIAS SUMMONS.—Where the publication of summons was made after the original summons was returned, it will be presumed upon appeal where nothing appears on the face of the record to the contrary that an *alias* summons was issued.

ID.—PAYMENT OF TAXES ASSESSED TO FORMER OWNER OF MORTGAGED PROPERTY.—Where one of the other defendants claiming under the insurance company defendant, which acquired title under foreclosure, paid taxes for a certain fiscal year which were assessed to the owner of the mortgaged property while he was in possession, such payment cannot inure to the benefit of such former owner.

APPEAL from a judgment of the Superior Court of Sonoma County. **Albert G. Burnett**, Judge.

The facts are stated in the opinion of the court.

A. Boyer, **James P. Sweeney**, and **James H. Boyer**, for Appellant.

Fox & Gray, and **J. M. Thompson**, for Respondents.

McLAUGHLIN, J.—This is an action in ejectment. Judgment having passed for defendants, the plaintiff appealed

from the judgment, and in his bill of exceptions specifies that the evidence is insufficient to sustain the findings of the court relating to the title and right of possession to the land in dispute. The facts essential to a decision are as follows:—

On September 19, 1890, one H. J. Fouts owned the land in controversy, and on said day executed and delivered to the defendant insurance company his note for three thousand dollars, secured by a mortgage upon said land. The title of Fouts passed by mesne conveyances to one Hellwegan, subject to the mortgage, and plaintiff claims title under a deed from Hellwegan dated June 30, 1900.

On July 13, 1894, an action to foreclose said mortgage was commenced, Hellwegan and his wife being made parties defendant. Summons was returned October 24, 1894, the return showing personal service on all the defendants except Hellwegan. On the same day an affidavit for publication of summons was filed, and the order for publication issued. Every step in the service of summons by publication is admitted to be correct, except that it is claimed that such order for publication is void, because the affidavit is insufficient.

There is a sharp conflict in the briefs as to the admission of said affidavit and order in evidence upon the trial of the case. Appellant claims that they were, and respondent that they were not, admitted.

During the trial of the case at bar counsel for defendants offered in evidence the *judgment-roll* in the foreclosure suit, and in making such offer enumerated a number of papers, among them the *affidavit and order for publication*.

No objection was made, and the court then said: "Very well, received in evidence, and considered as read and marked—that is the *judgment-roll in the case of Pacific Mutual Life Insurance Company v. Fouts*."

In view of what had just transpired, this pointed language was evidently intended to exclude the affidavit and order thus improperly enumerated and admit only the *judgment-roll*. If, however, there be any uncertainty as to this, that uncertainty must be resolved against appellant, who must show error affirmatively. (*Romaine v. Cralle*, 80 Cal. 628, [22 Pac. 296]; *Batchelder v. Baker*, 79 Cal. 267, [21 Pac.

754]; *O'Callaghan v. Bode*, 84 Cal. 493, [24 Pac. 269]; *Spelling on New Trial*, secs. 428-685.)

At the time the judgment in foreclosure was rendered (1894) neither the affidavit nor order for publication formed part of a judgment-roll. (*People v. Temple*, 103 Cal. 447, [37 Pac. 414]; *In re Newman*, 75 Cal. 213,¹ [16 Pac. 887].)

Hence these two papers were inadmissible, under the well-settled rule that a judgment cannot be thus collaterally assailed. (*Sharp v. Daugney*, 33 Cal. 505; *People v. Harrison*, 84 Cal. 609, [24 Pac. 311]; *Whitwell v. Barbier*, 7 Cal. 54; *Bennett v. Wilson*, 133 Cal. 385,² [65 Pac. 880].)

This is admitted by counsel for appellant, but he contends that the papers being attached to the judgment-roll, and enumerated when the offer was made, the court had no power of its own motion to strike out or refuse to admit evidence to which there had been no objection. This contention has no merit but its novelty. (Code Civ. Proc., sec. 128, subds. 1, 2, 3, 5.)

"The duty of the court is not confined to passing upon such portions of testimony as may be *excepted to*, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." (*Parker v. Smith*, 4 Cal. 106; *People v. Wallace*, 89 Cal. 166, [26 Pac. 650].)

As the affidavit and order were eliminated from the case by the trial court, the question of their sufficiency is eliminated here, and it could serve no useful purpose to lengthen this opinion by discussing such sufficiency, or other questions connected with and dependent upon the existence of the main question here.

It is urged that the summons was served by publication after the original summons was returned. If it be conceded that such was the case, it could make no difference, for nothing to the contrary appearing on the face of this record, it will be presumed that an *alias* summons was issued. (*People v. Davis*, 143 Cal. 678, [77 Pac. 651]; *Sacramento Bank v. Montgomery*, 146 Cal. 745, [81 Pac. 138].)

It is here expressly stipulated that the pleadings, findings, and decree in the foreclosure suit are sufficient in form and substance, and therefore such decree, importing as it does absolute verity, was binding on Hellwegan, and the sale

¹ 17 Am. St. Rep. 146.

² 85 Am. St. Rep. 207.

under said judgment passed his title to the Pacific Mutual Life Insurance Company.

This disposes of all the specifications of error and insufficiency of evidence, save one.

It is claimed that the evidence is not sufficient to sustain the finding that the defendant Bruner paid all the taxes on the land for 1895-1896.

That Bruner did in fact pay the taxes is not disputed.

Nor is it disputed that at the time of such payment Bruner was in possession of the land under a contract with the Pacific Mutual Life Insurance Company, through which the title finally passed to him.

But it is contended that because the property was assessed to Hellwegan at a time when he (Hellwegan) was in possession, the payment made by Bruner must be held made for the benefit of Hellwegan.

The mere statement of the proposition is its refutation.

The judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 34. First Appellate District.—May 29, 1905.]

In the Matter of the Estate of SARAH P. STEWARD, Deceased. ALICE B. FIFE, Respondent, v. GEORGE C. CLEVELAND, Appellant.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—OPPOSITION BY GRANTEE OF HEIR.—A grantee of an heir of real property is entitled to the share of the heir conveyed, and is a person interested in the estate, who is entitled under section 1540 of the Code of Civil Procedure to oppose an application for an order of sale thereof.

ID.—EVIDENCE—DEED FROM HUSBAND—AVERMENTS IN PETITION—ADVERSE CLAIM NOT INVOLVED.—Where the petition of the administrator for the order of sale averred that the person named as grantor in the deed was the husband of the deceased, a deed from the husband to the opponent of the petition was sufficient proof of such opponent's interest in the estate, and its introduction in evidence was proper, and did not involve the determination of an adverse claim to property of the estate.

Id.—PETITION FOR SALE OF LANDS IN DIFFERENT COUNTIES—EXPENSES OF ADMINISTRATION—BEST INTEREST OF ESTATE—FINDING.—Where the administrator petitioned for the sale of two distinct parcels of land in different counties to pay expenses of administration, and on the ground that it was for the best interest of the estate and those interested therein to sell both parcels, where it appeared that the sale of one parcel was amply sufficient to cover the expenses of administration, and the court upon opposition of a party interested denied the petition as to the other parcel, such denial is a finding that it was not for the best interest of the estate or those interested therein to sell the other parcel at probate sale.

Id.—QUESTION OF FACT—REVIEW UPON APPEAL.—The question whether it was the best interest of the estate or those interested therein to order a sale of both parcels of real estate was a question of fact to be determined by the superior court upon the evidence before it in relation thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property or of the parties interested therein, it is not open to review upon appeal.

Id.—APPEAL BY ADMINISTRATOR—PARTY NOT AGGRIEVED.—It is a sufficient answer to the appeal by the administrator, where none of the parties interested have objected to the terms of the order, that he is not aggrieved by an order refusing to sell one of the parcels, it being a matter of indifference to him whether those interested will be better subserved by a probate sale or by a distribution to them of such parcel.

APPEAL from an order of the Superior Court of Santa Cruz County denying a sale of one parcel of real estate. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Charles B. Younger, Jr., for Appellant.

Martin & Gardner, and Lindsay & Netherton, for Respondent.

HARRISON, P. J.—The appellant, as administrator of the estate of the above-named decedent, presented to the superior court a petition for an order for the sale of the real estate belonging to said estate. In his petition he set forth that the said real estate consisted of two parcels, one in the county of Santa Cruz, and the other in the county of Inyo; that it was necessary to sell one of the parcels for the purpose of paying the expenses of administration already incurred and

those yet to be incurred; that the heirs at law of the deceased were upwards of twenty in number, and that neither of said pieces of real property could be subdivided between them with advantage; and that for this reason it was for the benefit and best interests of the estate and those interested therein that all of the real estate should be sold; and he therefore prayed for an order directing him to sell both parcels.

Upon the day appointed for the hearing of the petition, the respondent appeared and filed an opposition thereto, setting forth that she had an interest in the estate by virtue of a conveyance of the Santa Cruz property and of an interest in the Inyo property made to her by one of the heirs at law of the deceased subsequent to her death; that the value of the Inyo property was sufficient to pay all the debts and expenses of administration of the estate, and that it was for that reason unnecessary to sell the Santa Cruz property. The administrator objected to the entertaining or hearing by the court of this opposition to his petition, on the ground that the matters set forth therein did not state sufficient objections to granting the same, and that the contestant was not a person interested in the estate; and that the court had no authority in this proceeding to hear or determine adverse or hostile claims to real property of the estate. The court overruled the objections, and proceeded to hear the evidence in support of the petition and the opposition thereto. It was shown that the Inyo lot had been appraised at nine hundred dollars and the Santa Cruz lot at seven hundred dollars, and that these were the values of the respective lots at that time; that after the death of the decedent one of her heirs had executed to Mrs. Fife, the contestant, a deed of conveyance, which purported to convey to her the Santa Cruz property; and the court found that the expenses of administration already incurred amounted to two hundred dollars, and that those to be incurred would amount to two hundred and fifty dollars. The court thereupon made an order, authorizing the administrator to sell the real estate in Inyo County, and denying his petition for a sale of the Santa Cruz property "upon the ground that the title to the same is in litigation and undetermined." From the portion of this order denying the petition to sell the Santa Cruz property the administrator has appealed.

It is a sufficient answer to this appeal that none of the parties interested in the property have objected to the terms of the order; and as it is a matter of indifference to the administrator whether those interested will be better subserved by a sale under the order of the probate court, or by a distribution to them, he is not aggrieved by the order made by the court, and under section 938 of the Code of Civil Procedure is not entitled to an appeal therefrom; but as counsel have presented the case without making this objection, we have considered the merits of the appeal as though it were authorized.

1. The court properly overruled the objection of the administrator to hearing the opposition of Mrs. Fife. As grantee of one of the heirs of the deceased, she would be entitled, upon a distribution of the estate, to the share of the heir so conveyed to her (Code Civ. Proc., sec. 1678; *Estate of Vaughn*, 92 Cal. 192, [28 Pac. 221]), and was thus a person interested in the estate; and under section 1540 of the Code of Civil Procedure entitled to oppose the application for the order of sale. The objection at the hearing to the introduction in evidence of the deed to her on the ground that it did not appear that her grantor had any interest in the property was fully overcome by the averment in the administrator's petition that the said grantor was the husband of the deceased. Its introduction did not involve the determination of any adverse claim to the property of the estate, but was proper for the purpose of establishing a right in Mrs. Fife to object to a sale of the entire property and to ask the court to limit its order to a sale of the Inyo property.

2. Whether it would be for the advantage, benefit, and best interests of the estate, or those interested therein, to order a sale of both parcels of the real estate, was a question of fact to be determined by the superior court upon the evidence before it in reference thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property, or of the parties who are interested therein, it is not open to review. The fact that after considering all the evidence before it it directed the sale of the Inyo property, and denied the petition for the sale of the Santa Cruz property, is a sufficient declaration by it that in its judgment it would not be for the benefit of the parties

interested to sell the latter; and this decision was not without evidence for its support. While the grounds stated in its order,—viz., “that the title to the same is in litigation and undetermined,”—is technically incorrect, in that it is not shown that there is any action pending in court with reference to its title, yet there was evidence that the title was in controversy. Mrs. Fife had stated in the objections filed by her that she claimed to be the owner in fee; and although the deed to her purported to convey the entire property in the lot, yet she had in fact only such interest in the lot as was in her grantor, and that interest was not shown to be other than such as he had by virtue of being an heir of the deceased. Although the Santa Cruz lot is so small in extent as to render its subdivision among the heirs impracticable, yet the court might reasonably conclude that if it should be distributed to them a better price would be realized upon its sale in an action between them for its partition, where the title could be judicially determined, than at a probate sale where the title of the deceased was admittedly in controversy. The court therefore exercised a wise discretion in determining that it would not be for the advantage of the parties interested to order its sale.

The order appealed from is affirmed.

Cooper, J., and Hall, J., concurred.

A petition to have this cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on July 25, 1905.

[No. 88. Third Appellate District.—May 29, 1905.]

In re Application of HARRY BUNKERS for Habeas Corpus.

CRIMINAL LAW—BRIBERY OF MEMBER OF LEGISLATURE—CONSTITUTIONALITY OF PENAL PROVISION—PUNISHMENT—DISFRANCHISEMENT.—Section 86 of the Penal Code, as re-enacted April 6, 1880, punishing legislative bribery as a felony, including disfranchisement as part of the punishment, is a revised and independent act, which is

not subject to section 26 of article IV of the constitution. The original section was not repealed by section 35 of article IV of the constitution; and the power of the legislature to punish legislative bribery by section 86 of the Penal Code as re-enacted was not withdrawn by that section of the constitution, and the legislature properly included the additional punishment of disfranchisement established by the constitution.

Id.—POWER OF LEGISLATURE—CONCLUSIVE PRESUMPTION.—An act of the legislature is conclusively presumed to be within its powers unless expressly prohibited by the state or federal constitution.

Id.—INVESTIGATION BEFORE SENATE COMMITTEE—BUILDING AND LOAN CORPORATIONS—CORRUPT RECEIPT OF BRIBE.—The legislature has power under section 1 of article XII of the constitution and section 883 of the Civil Code to investigate the affairs of all corporations in this state; and a member of a senate committee appointed for the purpose of investigating the affairs of building and loan corporations is charged with a duty in his official capacity as a member of the senate, and if he accepts a bribe to prevent such investigation and to cast his official vote against it, he is guilty of bribery as a member of the legislature.

Id.—SUFFICIENCY OF INDICTMENT—HABEAS CORPUS.—Where the indictment sufficiently charges bribery as defined by subdivision 6 of section 7 and by section 86 of the Penal Code, and states the offense with sufficient particularity to give the court jurisdiction of the charge, the party charged cannot for any alleged defect in the statement be discharged upon writ of *habeas corpus*.

Id.—JURISDICTION OF COURT.—The superior court of Sacramento County has jurisdiction of the offense of bribery committed therein by a member of the legislature.

APPLICATION for Writ of Habeas Corpus to the Sheriff of Sacramento County for discharge under sentence after conviction under indictment in the Superior Court. E. C. Hart, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, and H. L. Partridge, for Petitioner.

A. M. Seymour, District Attorney, for Respondent.

CHIPMAN, P. J.—Application for writ of *habeas corpus*.

Petitioner was indicted for the crime of bribery, convicted by a jury and sentenced by the court to imprisonment in the state prison at San Quentin for the term of five years, and is now in the custody of the sheriff of Sacramento County by

virtue of the judgment of conviction and an order of commitment indorsed thereon.

The indictment is as follows:—

“The said Harry Bunkers, on the — day of January, A. D. 1905, at the said county of Sacramento, in the said state of California, and before the finding of this indictment, the said Harry Bunkers being then and there a member of one of the houses, to wit: the senate, composing the legislature of the state of California, to wit: the senator of the state of California in and for the eighteenth senatorial district, and being then and there a member of a regularly constituted committee of the said senate of the state of California, to wit: the committee on commissions and retrenchment, and the said legislature of the state of California being then and there duly and regularly convened in its thirty-sixth session, did then and there willfully, unlawfully, feloniously and corruptly ask and receive from one Joseph Jordan a bribe, to wit: the sum of three hundred dollars in lawful money of the United States, upon the agreement and understanding that his, said Harry Bunkers’, official vote, opinion, judgment and action as such senator and member of said house of said legislature, should be influenced thereby and should be given in a particular manner and upon a particular side of a question and matter upon which he might be required to act in his official capacity, to wit: the said bribe, to wit: the sum of three hundred dollars lawful money of the United States, was so given by said Joseph Jordan to the said Harry Bunkers, and was so received by the said Harry Bunkers from said Joseph Jordan upon the understanding and agreement that he, said Harry Bunkers, as such member of one of the houses of the legislature of the state of California, to wit: the senate, and as such member of said committee on commissions and retrenchment, would give his official vote to secure the Renters’ Loan and Trust Company, a corporation, and the Phoenix Savings, Building and Loan Association, a corporation, immunity from investigation of their affairs and business by said senator of the state of California, and by said committee on commissions and retrenchment, and that he, said Harry Bunkers, would give his official vote as such senator and such member of said committee as aforesaid to secure the said Renters’ Loan and Trust Company,

a corporation, and the said Phoenix Savings, Building and Loan Association, a corporation, immunity from any unfavorable comment or report by the said senate of the state of California, and by the said committee of the senate of the state of California, to wit: the committee on commissions and retrenchment, there being then and there pending before said committee on commissions and retrenchment an investigation of the affairs and business of said corporations, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California.

A. M. SKYMOUR,

"District attorney of Sacramento County,
in the state of California."

The points urged by defendant at the argument were: 1. That section 86 of the Penal Code, under which the indictment was drawn, was repealed by force of section 35 of article IV of the state constitution; 2. That the legislature, and necessarily this committee, has no power to investigate the business of a private corporation, and that the act for the doing of which petitioner was charged was not an act within his official duty, and hence there could be no bribery involved; 3. Even if the legislature had the power to make such investigation, still the indictment fails to state matters of substance required by law and hence charges no offense; and 4. That the writ of *habeas corpus* will lie because the court before which the cause was tried was without jurisdiction.

1. The argument of counsel, at the hearing of the return, was based on the assumption that section 86 was enacted under the old constitution. The contention was, that this section as it then stood was inconsistent with section 35 of article IV of the present constitution, and therefore was repealed by virtue of section 1 of article XXII; and that it does not help the matter to say that section 86 has been amended since the adoption of the new constitution. Upon this latter point the claim is, that the old section 86 being repealed, because of its being inconsistent with section 35 of article IV, it follows that there was nothing to amend, and hence the amendatory act is void.

Section 24 of article IV of the constitution provides, among other things, as follows: "No law shall be revised or amended

by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." Section 86 of the Penal Code, under which this indictment was found, was passed April 6, 1880, subsequent to the adoption of the constitution. (Amendments to Penal Code, 1880, p. 7.)

It was said in *Pennie v. Reis*, 80 Cal. 266, [22 Pac. 176], that the provision of section 24 of article IV does not apply to an independent act; and in *Donlon v. Jewett*, 88 Cal. 530, [26 Pac. 370], it was held that a revised or amended act must be construed as a new and original piece of legislation.

We have examined with much care section 86 of the Penal Code and section 35 of article IV of the constitution, and have not been unmindful in doing so of the rules of interpretation relied on by petitioner; and our opinion is that the constitution did not work the repeal of the code section. We are therefore to be guided by the rule laid down in *Donlon v. Jewett* rather than the rule in *Pennie v. Reis*. The sole question then is, Was the power of the legislature to legislate upon the subject of legislative bribery withdrawn by section 35 of article IV?

The constitution does not either by its terms or by necessary implication forbid the legislature to pass such a statute as is found in section 86 of the Penal Code. The language of the constitution is: "Any member of the legislature, who shall be influenced in his vote or action upon any matter pending before the legislature by any reward, or promise of future reward, shall be deemed guilty of a felony, and upon conviction thereof, *in addition to such punishment as may be provided by law* shall be disfranchised and forever disqualified from holding any office or public trust."

In declaring the acts therein described to be a felony, and upon conviction thereof that the guilty party "shall be disfranchised and forever disqualified from holding any office or public trust," the provision is mandatory and self-executing, and as a penalty for the acts such guilty party must be so adjudged to suffer; but this is not the sole penalty, but is what the constitution declares a penalty "*in addition to such punishment as may be provided by law.*" In re-enacting section 86 the legislature very properly, in addition to imposing imprisonment on its own initiative, as the con-

stitution clearly implies it may do, included the constitutional punishment, in order, probably, that the entire penalty to be inflicted might appear in a single section of the Penal Code. It will be observed that the crime of lobbying denounced by this same section 35 of article IV is to be punished as the legislature may provide. It is not possible by any reasonable interpretation of these provisions of the constitution to say that the framers of that instrument intended it to embrace all needed legislation on the subject of legislative bribery and to forbid further legislation on that subject.

It is hardly necessary to point out the distinction between the constitutional powers of the United States and the like powers of the states. Suffice it to state briefly that the latter possess general powers of legislation while the former possesses such only as are granted. A state law is conclusively presumed to be within the powers of the legislature unless in the constitution of the United States or of the state we are unable to discover that it is prohibited. (Cooley on Constitutional Limitations, 7th ed., p. 126; *Ex parte Mabry*, 5 Tex. App. 93.)

Petitioner's contention, therefore, that there is now no law punishing legislative bribery except it be found in the provisions of the constitution, cannot be maintained.

2. It is further claimed that petitioner was not charged with any official duty in respect of the investigation mentioned in the indictment, and therefore bribery cannot be predicated of his alleged acts.

Stripped of its technical formalities, the indictment shows that petitioner was a member of the senate then in session, and was also a member of a regularly constituted senate committee, before which an investigation of the affairs and business of certain building and loan corporations of this state was then pending, and that he corruptly asked and received a bribe of three hundred dollars upon the agreement and understanding that his "official vote, opinion, judgment and action as such senator and member of said house of said legislature, should be influenced thereby and should be given in a particular manner upon a particular side of a question and matter upon which he might be required to act in his official capacity," and that such bribe was received with the

further understanding that as such senator and as a member of this committee he would give his official vote to secure these corporations immunity from investigation of their affairs by the senate and the committee and also give his official vote to secure them immunity from any unfavorable comment or report by the said committee.

The point made by petitioner was strongly urged at the argument, and reliance was especially placed upon the *Matter of Pacific Railway Commission*, 32 Fed. 241, 12 Saw. 559, and *Kilbourn v. Thompson*, 103 U. S. 168, and also section 1 of article III of the constitution of California.

Respondent cites numerous cases holding that the legislature has the power to investigate the business and affairs of corporations; and that whether or not the legislature had such power is immaterial, as the matter of an investigation was pending and official action was called for. (Citing, as to the power, *Burnham v. Morrissey*, 14 Gray, 226;¹ *Crease v. Babcock*, 23 Pick. 344;² *People v. Keeler*, 99 N. Y. 463,³ [2 N. E. 615]; *Ex parte McCarthy*, 29 Cal. 395; *Market-St. Ry. Co. v. Hellman*, 109 Cal. 571, [42 Pac. 225]; *McGowan v. McDonald*, 111 Cal. 57,⁴ [43 Pac. 418]; Const. 1879, art. XII, sec. 1; Civ. Code, sec. 383.)

As to the immateriality of the question of power, the investigation being in fact pending, the following citations are given: *State v. Potts*, 78 Iowa, 656, [43 N. W. 534]; *Glover v. State*, 109 Ind. 391, [10 N. E. 282]; *Commonwealth v. Lapham*, 156 Mass. 480, [31 N. E. 638]; *State v. Ellis*, 33 N. J. Law, 102;⁵ *State v. Lehman*, 182 Mo. 424,⁶ [81 S. W. 1118]; Pen. Code, sec. 86.

Section 1 of article XII of the constitution provides that corporations may be formed under general laws, and declares that "All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Section 383 of the Civil Code, passed March 21, 1872, provides as follows: "The legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this state at all times; and, for that purpose, any com-

¹ 74 Am. Dec. 676.

² 24 Am. Dec. 61.

³ 53 Am. Rep. 42.

⁴ 52 Am. St. Rep. 149.

⁵ 97 Am. Dec. 707, and note.

⁶ 103 Am. St. Rep. 670.

mittee appointed by the legislature, or either branch thereof, may administer all necessary oaths to the directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of keys, books, papers, and documents by summary process, to be issued on application to any court of record or any judge thereof, under such rules and regulations as the court may prescribe."

What the limit is of the powers which may be exercised under these provisions of the constitution and the statute is not necessary now to prescribe. But whatever that limit may be, we are clearly of the opinion that it was not reached by the committee of the legislature in entering upon an investigation of the affairs of the corporation mentioned in the indictment, which investigation we must presume was either within its regular and ordinary duties under standing rules of the senate or was specially devolved upon it by that body. If the legislature cannot exercise this power through a committee, it had not the power to create a board of commissioners of loan associations upon which, by the act of March 23, 1893 (Stats. 1893, p. 299), even greater powers are conferred than were alleged to have been assumed by the legislative committee of which petitioner was a member. Similar powers also are being exercised by the bank commissioners and other bodies created by the legislature. The argument which would destroy the power of the legislature, through its committees, to inquire into the affairs of corporations, with a view to correct corporate abuses, would also destroy the power of the commission created by it for that purpose. But such exercise of legislative power has been long exercised and universally acquiesced in, and is, we think, unquestionably entrenched in our system of government.

The learned trial judge, whose opinion is before us, well observed: "Corporations of the character of those under investigation by the committee on commissions and retrenchment of the senate are creatures of the law. While they are not, under our constitution, created by direct act of legislation, they are, nevertheless, just as much creatures of the legislative power as they were previous to the adoption of our

present organic law. Our legislators necessarily gather wisdom evidenced in our system of laws from experience, and it is therefore one of the duties of citizens elected to the legislative branch of the government to gather all information, facts, and data necessary to a proper performance of their duty, and thus place themselves in a position where they can give the state as nearly a perfect code of laws as human ingenuity is capable of. The legislature has passed general laws by virtue of which corporations of all kinds and classes may come into existence. It is true that if these corporations violate the laws by which they are formed and organized, and thereby deprive citizens of their rights, the remedy would be an appeal to the judicial arm of the government. But where there are manifest defects in the general laws authorizing the establishment of such corporations it is not only proper, but absolutely the duty of the legislative department to gather information upon the subject in all legitimate ways to enable it to make such reforms in those general laws as will prevent, or at least minimize, the wrongs which flow from such defects. . . . This may be called a visitorial or supervisorial power, but, whatever its proper designation, it is, nevertheless, a power that exists, and one which ought to exist, and without the existence of which the public would have no adequate protection from corporations which, legally established, are managed so as to perpetrate fraud upon the rights of the people with whom they do business."

Similar and equally pertinent views will be found expressed in *People v. Keeler*, 99 N. Y. 463,¹ [2 N. E. 615], and other cases above cited by the district attorney.

3. It is contended that the indictment "is defective in some matter of substance required by law," and petitioner should be discharged by virtue of subdivision 3 of section 1487 of the Penal Code. But it also provides that the defect referred to must have the effect of "rendering such process void,"—i. e. the indictment in this case. (Citing *People v. Ward*, 110 Cal. 368, [42 Pac. 894]; *People v. Dunlap*, 113 Cal. 72, [45 Pac. 183], and some other cases.) *People v. Ward* was a case of bribery, and the indictment charged that defendant did willfully, feloniously, etc., "give a bribe" to a certain member of the board of supervisors, with intent to corruptly

¹ 52 Am. Rep. 49.

influence him in a certain matter. The court said that this was not an averment of any act of defendant sufficient to bring his alleged conduct within the legal meaning of bribery as defined by subdivision 6 of section 7 of the Penal Code. Meeting the contention of respondent, the people, that it was sufficient to allege an offense in the language of the statute, the court said: "The offense charged in the case at bar is not *alleged* in the language of the statute in the indictment under review. It does not allege 'the acts and facts which the legislature has said shall constitute the offense.' The material acts or facts constituting the legislative definition of bribery are the giving to a public officer something 'of value or advantage, present or prospective,' or giving 'any promise' or entering into any 'undertaking' to give something of value or advantage. There is no averment that appellant gave the supervisor anything of value, or of advantage, or that he gave anything at all; or that the thing was of present or prospective advantage; or that it was a promise to do something, or an undertaking of some kind which was or would be, beneficial to the supervisor." In the indictment before us the district attorney seems to have been careful to meet the requirements as set forth in *People v. Ward*. It was further said in that case, speaking of the rule of pleading where the pleader follows the statute: "It means simply this: that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely, to the person charged." We think the indictment here is sufficient to charge bribery as defined in subdivision 6 of section 7 and section 86 of the Penal Code. Nor can we see how the district attorney could have well stated with greater particularity the acts of which the crime alleged is predicated. It was held in *Ex parte McNulty*, 77 Cal. 164,¹ [19 Pac. 237], that even where inartificially drawn, "if the complaint shows an evident attempt to state the essential facts which constitute the crime sought to be charged the defect in the statement would not warrant the discharge of the defendant" on *habeas corpus*. (See, also, *Ex parte Kowalsky*, 73 Cal. 120, [14 Pac. 399], where it was said: "If enough appears in such defective indictment to

¹ 11 Am. St. Rep. 257.

show that an offense has been committed of which the court has jurisdiction, the party charged cannot be discharged under a writ of *habeas corpus*.'')

4. Upon the petitioner's fourth point it need only be said that the court, in our opinion, had jurisdiction of the cause. The writ is discharged and prisoner remanded.

Buckles, J., and McLaughlin, J., concurred.

[Crim. No. 5. Third Appellate District.—May 29, 1905.]

THE PEOPLE, Respondent, v. AL DURAND, Appellant.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—APPEAL FROM JUDGMENT ALONE—INSTRUCTION—REVIEW OF EVIDENCE.—Upon appeal from a judgment of conviction of an assault with a deadly weapon, upon a bill of exceptions, where there was no motion for a new trial, if there is some evidence tending to show that the weapon was deadly, and an instruction correct in law was given upon that subject, the insufficiency of the evidence to show whether the weapon was deadly cannot be reviewed.

Id.—GROUND FOR NEW TRIAL—CONSTRUCTION OF CODE—APPLICABILITY OF INSTRUCTION.—The insufficiency of the evidence is made ground for a new trial under section 1181 of the Penal Code, and included in the provisions of section 1170 or 1259 of that code. Where it appears that a correct instruction is inapplicable to any evidence in the case, it may be reviewed upon a bill of exceptions upon appeal from the judgment, and it devolves upon the district attorney to show that there is some evidence to which it is applicable.

APPEAL from a judgment of the Superior Court of Tullumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

E. W. Holland, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted of the crime of assault with a deadly weapon. He appeals from the judgment on a bill of exceptions duly settled and allowed. There

was no motion to instruct the jury to acquit when the prosecution rested, nor for a new trial, and there is in the record no exception taken to any ruling or decision of the court. The court instructed the jury as follows: "That in order to convict the defendant of the crime charged in the complaint, it must appear from the evidence, beyond a reasonable doubt, that the alleged assault was made with a deadly weapon, and that it is incumbent on the prosecution to prove beyond a reasonable doubt and to a moral certainty that the weapon mentioned in the information was in fact a deadly weapon." The point made by defendant is, that although the instruction is a correct statement of the law, the evidence is insufficient to establish as a fact that the weapon with which defendant was assaulted was a deadly weapon, and hence the verdict was in violation of the instruction given.

The attorney-general contends that the sufficiency of the evidence may not be inquired into on this record.

It was held in *People v. Keyser*, 53 Cal. 183, that the defendant may, upon an appeal from the judgment without having made a motion for a new trial, rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and, of course, we may add, when the record contains a bill of exceptions, he may likewise rely upon any of such grounds. These grounds are stated in three paragraphs of the section, the first two of which can have no possible reference to the point made by defendant. The third paragraph also contains matter equally inapplicable to this case, and the only ground of exception at all applicable is an error of the court "in charging or instructing the jury upon the law on the trial of the issue."

Section 1181 of the same code enumerates in several different paragraphs the cases in which the court may, when the defendant has been convicted, grant him a new trial. It will be seen from a comparison of these two sections, as was said in *Walker v. Superior Court*, 135 Cal. 369, [67 Pac. 336], that "there are certain matters which may be pressed to the attention of the court upon motion for a new trial alone, and certain other matters which may be brought by a proper bill of exceptions to the attention of the appellate court, either upon denial of the motion for a new trial or upon direct appeal from the judgment, without the intervention

of a motion for a new trial." The court then points out, by way of illustration, some of the matters which may be considered on an appeal from the judgment where there is no motion for a new trial. This exposition shows quite clearly that cases arise where "the instruction, though correct in point of law, is inapplicable to any evidence in the case, or to any theory which may be taken of the evidence in the case." An instruction upon the principle of flight as evidence tending to show guilt is given by way of illustration. Should defendant claim that there was no evidence whatsoever in the case tending to show that he had fled or attempted to escape from custody he would have the right to so claim in a bill of exceptions on his appeal from the judgment, and it would be the duty of the district attorney to point out the evidence disputing such claim. So, also, as to defendant's exceptions to the rulings of the court in admitting or rejecting testimony. "His right to except to these is reserved by subdivision 3 of section 1170. His right to press his exceptions upon appeal from the judgment is preserved to him by section 1259 and the decision in *People v. Keyser*, 53 Cal. 183." But does the right extend to the case here? There was some evidence tending to show that the weapon used by the defendant, and with which he made the assault, was a deadly weapon. The claim is, that it was insufficient to prove the deadly character of the weapon, not that there was no evidence tending to show its character. If upon an appeal from the judgment alone the defendant may claim that the evidence is insufficient to establish the character of the weapon used in an assault, in order to show that the weapon used was not such as the instruction declared was essential to conviction of defendant, we do not see but that any other essential fact upon which there is a correct instruction, and as to which fact there is some evidence in the record, may also be reviewed in like manner, and the requirement of motion for a new trial would be practically abrogated. An instruction as to the doctrine of reasonable doubt would allow the defendant to have the evidence examined on his appeal from the judgment in order to show that there was grave doubt of his guilt. So also as to the intent with which the act was committed. Indeed, the rule would permit almost every fact tending to show guilt to be thus re-examined

without a motion for a new trial and on the appeal from the judgment alone. The provision of section 1259 is that on such appeal "the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." If the claim had been that there was no evidence whatsoever tending to show that any weapon was used in the assault, or that there was no evidence whatsoever tending to show that the weapon used was a deadly weapon, the case possibly might be said to be similar to the case suggested in the illustration relating to the flight of a defendant. But such is not the claim, for, as we have seen, it is conceded that there was some evidence on the point.

In *People v. Ward*, 145 Cal. 736, [79 Pac. 448], the court did not find it necessary to decide the question now involved, but it was there said that a defendant cannot have reviewed an order which denies him a new trial on the ground that the verdict is unsupported by the evidence unless he shows by his bill of exceptions that he moved on that ground. The reason there given for requiring the bill to show that a motion had been made on the ground urged applies even more strongly to a case where it is sought to review the evidence on an appeal from the judgment.

The court cannot look to the testimony brought up by a bill of exceptions on an appeal from the judgment alone, unless authorized to do so on a motion for a new trial, except in cases arising under section 1170 as interpreted in *People v. Keyser*, 53 Cal. 183, or in cases to which section 1259 is applicable. The insufficiency of the evidence to sustain the verdict is expressly made the ground for a new trial under section 1181; it is not a matter mentioned in section 1170, nor is it included in the rights reserved to defendant by section 1259. There is a wide difference between the case where there is some evidence to a fact, although claimed to be insufficient, and where there is an entire absence of evidence to a fact concerning which there is an instruction. In the former case, if the instruction is correct as matter of law, the court cannot, on appeal from the judgment alone, look into the record to examine into insufficiency of the evidence, but defendant must move for a new trial to have the evidence reviewed. In the latter case, he may, on his appeal from the judgment alone, claim an entire absence of evidence, in

which case "the district attorney must," as was said in *Walker v. Superior Court*, 135 Cal. 369, [67 Pac. 336], "point out the evidence militating against the statement and cause it to be inserted by way of amendment to the bill."

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

[No. 1. Third Appellate District.—May 29, 1905.]

In the Matter of the Guardianship of the Person and Estate
of SARAH C. HAYDEN, Incompetent.

GUARDIANSHIP—INCOMPETENT PERSON—SALE OF REALTY.—The guardian of an incompetent person may be authorized to sell the real property of the incompetent, where it appears necessary and for the best interest of the estate, in order to pay expenses, debts, and cost of maintaining the incompetent ward.

ID.—OPPOSITION TO SALE—CONTRACT TO DEVISE PROPERTY—INSUFFICIENT PROOF—COMPENSATION—IMPOSSIBILITY OF PERFORMANCE—UNEXPLAINED FAILURE.—An opposition to the sale by one who seeks to enforce a contract with the incompetent to devise the property, for personal services, board and care for life, and cost of burial and monument, will not be sustained, nor the contract enforced in equity, where the proof is not clear, positive, nor convincing as to the existence and terms of such contract, or the services to be rendered, and where the services rendered may be fully compensated, and it is impossible to make a binding offer of full performance, and there is an unexplained failure to perform the alleged contract prior to the guardianship.

ID.—RULING UPON EVIDENCE—QUESTION TOO BROAD.—It was not error to overrule a question which was too broad, so as to include any agreement in reference to all real property, and which was not confined to the agreement alleged.

ID.—CROSS-EXAMINATION—WHOLE OF CONVERSATION.—It was proper on cross-examination to bring out the whole of a conversation partially testified to in the examination in chief.

APPEAL from an order of the Superior Court of San Joaquin County for sale of the real estate of an incompetent person. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

Nicol & Orr, and E. P. Foltz, for Respondent.

McLAUGHLIN, J.—On March 20, 1903, A. L. Westing, a grandson of Sarah C. Hayden, was appointed guardian of her person and estate.

On April 11, 1903, said guardian applied to the court for an order of sale of certain real property, alleging in his petition that such sale was for the best interest of the estate, and was necessary, because the personal property and income from the real property were insufficient to pay the expenses of guardianship, the outstanding debts, and costs of maintaining his ward.

The appellant, F. H. Collins, filed objections and answers to said petition, denying all the above-recited averments. It is then alleged that on September 1, 1901, the said incompetent entered into a contract whereby she agreed that if he would come to Stockton and live with her, act as her business agent and manager, furnish her board, care, comfort, companionship, and protection during her life, and after her death bury her and erect a monument over the graves of herself and husband, she would give and bequeath unto him, among other property, the parcel of land here sought to be sold. He then alleges a part performance of said contract, and avers that said guardian, hoping to benefit himself, as a probable heir of said incompetent, prevented the further performance of this contract, and is endeavoring to repudiate the same, and cause said property to be unnecessarily sold in violation of its terms.

Under these pleadings the issues presented were tried, the order granted, and contestant appeals therefrom upon a bill of exceptions containing many assignments of error in rulings on the admission of evidence, and specifying that the evidence is insufficient to sustain the order in the particulars set forth in the above recital of issuable facts.

It can hardly be contended that the property of an incompetent cannot be used for her maintenance and the payment of her debts, as well by the guardian as by herself, if competent. Nor can it be successfully maintained that the guardian cannot be authorized to sell any part of the real property for such purpose. (Code Civ. Proc., secs. 1777-

1781; *Smith v. Biscailuz*, 83 Cal. 350, [21 Pac. 15, 23 Pac. 314]; *Fitch v. Miller*, 20 Cal. 352.)

The evidence is entirely sufficient to sustain the conclusion that such sale was necessary, and for the best interest of the estate. The evidence of appellant alone would sustain that conclusion; for if he boarded Mrs. Hayden for a considerable time, and the property without that burden yielded a surplus of only thirty-nine dollars, it appears that the income is entirely inadequate to entirely maintain the ward now.

In any event, the evidence is conflicting, and the conclusion of the court below must be sustained.

But it is claimed that this *specific parcel of land* could not be sold until other property, not within the contract mentioned, had been disposed of.

Equity recognizes, and will enforce, such contracts as the one here pleaded, but it demands that the evidence to prove their existence and terms be clear, positive, and convincing. And the contract must be definite, certain, and just, and in consonance with sound public policy. (*Owens v. McNally*, 113 Cal. 452, [45 Pac. 710].)

The services rendered must be such that they cannot be fully compensated in money. (*McCabe v. Healy*, 138 Cal. 86, [70 Pac. 1008]; *Owens v. McNally*, 113 Cal. 450, [45 Pac. 712].)

And when the contract is for conveyance of land, in consideration for personal services, extending through a future indefinite period, and the relief sought is the prevention of a sale of the land, until specific remedy is ripe—it being manifestly impossible to make a binding offer and tender of performance of such personal services—the relief asked will be denied, for the obvious reason that rights will not be conserved which may never accrue. (*O'Brien v. Perry*, 130 Cal. 526, [62 Pac. 927]; *Stanton v. Singleton*, 126 Cal. 665, [59 Pac. 147]; *Grimmer v. Carlton*, 93 Cal. 193,¹ [28 Pac. 1043]; *King v. Gildersleeve*, 79 Cal. 504, [21 Pac. 961].)

Then, too, "Courts will be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction." The nature and character of the services to be rendered must be certain;

¹ 27 Am. St. Rep. 171.

and, in fact, certainly must exist as to all terms of the contract. (*Owens v. McNally*, 113 Cal. 452, [45 Pac. 712]; *McCabe v. Healy*, 138 Cal. 86, [70 Pac. 1008].)

Tested by these rules, the evidence here presented is far from being satisfactory.

The appellant himself seems to be doubtful as to whether he was to take the land by deed during life, or by testamentary disposition; and seems equally doubtful touching the precise nature of the services to be rendered by him, and the position he was to occupy in the household. At times his evidence conveys the idea that she was to convey the land to him presently, and again it was to come to him at her death.

A carpenter by trade, he worked continuously, and on one occasion at least he was paid for working on her property.

Up to December, 1902, the executor of her husband's estate had charge and control of the property, and it does not appear that appellant ever did more than to collect rent occasionally and turn the money over to his aunt.

His wife, who heard both parties discuss the agreement, is equally unsettled as to their *status* in the household, the character of services to be rendered, and the quantity of property to be given or bequeathed. Her version of the matter in her own language is: "We were simply to pay her board, and she was to board with us; she was to furnish the house in which we live, and as she stated to me, her own self, several times, we were to make a home for her, and we were to have a home free of rent; that item of rent was distinctly mentioned. It was just like a son coming to live with his mother, as far as I can state; it was not a son coming to live with his mother, but that is the way she said it."

From January 30, 1903, Mrs. Hayden paid the servant, bought her own provisions, and the servant cooked them for her. And she paid the grocery bills for herself and the girl.

The testimony of Mr. Webster is in accord with the evidence of Mrs. Collins on salient points. And his evidence relating to the escrow deed from Mrs. Hayden to Collins absolutely negatives the existence of any contract to pass *this property* to Collins by deed or testamentary disposition. For if she was thus bound to make a disposition of *particular property*, it is more than probable that it would have been

included in a deed deliverable after her death, and this parcel was not so included.

Mr. Collins apparently pursued his occupation as a carpenter without interruption. He had the use of *her* house rent free and obtained his wood from *her* ranch. In fact, it might be said that he enjoyed *quid pro quo* for every service rendered.

His evidence in direct examination fitted his legal rights with such nicety as to give to his conduct and all the surrounding circumstances peculiar significance.

Why did he charge for work on her property? Why his ignorance of her affairs? And why did she, without apparent objection on his part, have her meals prepared by her servant, under the same roof where separate meals for himself and family were prepared? These circumstances, significant and potent, must be weighed with his testimony.

Moreover, he testifies that his services, except his personal affection, can be compensated in money, and as his personal affection may still be bestowed, and is not in law a subject of compensation, he can be placed in *statu quo*. (*McCabe v. Healy*, 138 Cal. 86, [70 Pac. 1008].)

Then, too, he did not perform the contract he attempts to prove, for from January 30, 1903, and until the guardian removed the incompetent from her home, appellant did not pay her board or other expenses, and he does not explain such failure.

The evidence is voluminous, and no necessity exists for further recitals therefrom. Sufficient appears to point the reason for holding, as we do, that the evidence is not of that clear, positive, and convincing nature or the contract of such character that the relief here sought could be given.

We have examined the errors complained of in subdivisions 8 to 16 of appellant's brief and find no prejudicial error. It was not error to sustain the objection to the question mentioned in subdivision 8. The question was broad enough to include *any agreement*, and the objection was, that it was incompetent *if calculated to show any interest* of Collins *in any property* belonging to Mrs. Hayden. The property, admittedly, was all real property, and any parol agreement showing a *present interest* in such property was objectionable. There was testimony in the case *at that time*

tending to show that a deed had been made to Collins, and if the conversation concerning this agreement did not relate to the contents of such alleged deed, and did relate to an agreement to make testamentary disposition of property, counsel should have so explained, and then confined his question to the agreement sought to be established. He did not do so, or attempt to follow the subject further; and as the state of the case justified the objection and ruling, there was no error. It was proper cross-examination to draw from Mr. Webster *all* the conversation he had with Mrs. Hayden. He had, on direct examination, testified concerning conversations with her, and appellant could hardly expect that portions which might be unfavorable could be excluded. The other rulings are so manifestly correct that it would only lengthen this opinion to discuss them.

The judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

A petition to have the cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on July 25, 1905.

[No. 2. Third Appellate District.—May 31, 1905.]

In the Matter of the Estate of H. G. BUHRMEISTER, Deceased. A. L. BUHRMEISTER et al., Appellants, v. WALLACE BUHRMEISTER, Respondent.

WILLS—CONSTRUCTION OF—DESIRE AND DIRECTION FOR LEASE.—A provision in a will expressing a "desire" that a son named "shall have the use and occupation, rents, issues, and profits of my fruit ranch," described, for the period of five years from the death of the testator, together with all household and kitchen furniture and personal property used in connection therewith, at a specified annual rental, to be paid in equal shares to his brothers and sisters, and a "direction" to all other children to execute to said son immediately after his death "a lease of said premises and personal property for the said term and upon the conditions herein expressed," shows a clear intention that such son shall have the use of the property described for the period of five years.

ID.—DEVISE OF ESTATE—SUBJECTION TO LEASE—DISTRIBUTION.—Where the testator devised all of his estate in equal shares to six children, including such lease, in a previous article of the will, such devise is not without limitation, but is subject to the lease for five years subsequently provided for in favor of one of them as against the others, and the property was properly distributed subject to the provision for the lease.

APPEAL for a decree of distribution under the will of a deceased testator in the Superior Court of Solano County.
A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Reese Clark, for Appellants.

George A. Lamont, for Respondent.

CHIPMAN, P. J.—Settlement of final account of executors and distribution.

The testator by article II of his will devised all his property to his six children, naming them, "in equal shares, share and share alike."

Article III of his will is as follows: "It is my desire that my son, Walter Buhrmeister, shall have the use and occupation, rents, issues and profits of my fruit ranch of about (60) sixty acres, near Manka's Corner, for the period of five (5) years immediately after my death, should he live so long, together with all my household and kitchen furniture and all personal property belonging to me and used in connection with said fruit ranch, at the annual rental of three hundred dollars (\$300) to be paid annually at the end of each year, to his brothers and sisters, sixty dollars (\$60) to each, together with all taxes of every kind which may be levied upon said property during said term; and I direct all my other children to execute to my said son Walter, immediately after my death, a lease of said premises and said personal property for the said term and upon the conditions herein expressed."

The court distributed the estate subject to these provisions of the will. Appellants contend that the whole estate was vested in the devisees by article II of the will and that article III expressed but a mere wish or suggestion; that Walter was not bound to take under this article that there was no

imperative obligation imposed on him, and "if he is not bound it cannot be said that the other devisees are bound to be divested of their estate for five years at the option of Walter." (Citing *Estate of Marti*, 132 Cal. 666, [61 Pac. 964, 64 Pac. 1070]; *Hess v. Singler*, 114 Mass. 56; *Colton v. Colton*, 127 U. S. 300, [8 Sup. Ct. 1164].)

In *Estate of Marti*, 132 Cal. 666, [61 Pac. 964, 64 Pac. 1070], the principles upon which courts have in the past interpreted, and now interpret, similar provisions of wills, are very fully discussed, and, as far as seems possible, the decisions are sought to be harmonized by a very full examination of the English and American cases. Our code provisions on the interpretation of wills (Civ. Code, sec. 1317 et seq.) are also elucidated to some extent. We feel relieved by this discussion from the necessity of re-examining the questions. In the *Marti* case the entire estate was given by will to the testator's wife. Following this devise was the following provision: "Upon the death of my wife, I desire that one half of the property bequeathed to her shall be devised by her to my relatives." It was held that the devisee was entitled to the entire residue of the estate of her husband free from any limitation or trust.

"A will is to be construed according to the intention of the testator." (Civ. Code, sec. 1317.) "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." (Civ. Code, sec. 1318.) "All parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." (Civ. Code, sec. 1321.) "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." (Civ. Code, sec. 1325.) Notwithstanding all efforts by statute and by decisions of the courts to simplify and make clear the rules by which to interpret wills, there are certain uses of words which seem beyond absolute and unvarying definition when used in wills. Among these are precatory words. It was said in the *Marti* case to be "im-

possible to harmonize the several decisions upon the subject" as to what estate may be created by such words; and it was added "that the decision in any one case cannot be taken as a precedent for another." Having in view the rules of interpretation stated in the Civil Code and without violating the reasoning in the Marti case, we think it reasonably clear that the testator, in the present case, intended to do more than leave a mere request behind him as to his son Walter.

In the paragraph of his will expressing his desire, and concerning its subject-matter, he directs certain things to be done in a way to show clearly an intention and not a mere desire that Walter should have the use of the property described for a period of five years. It is this feature of the will, set forth so specifically, that differentiates it from the Marti will. It is true that the court said in that case that no case had been cited to it in which it had been determined that a devise in absolute terms had been held to be in trust by reason of words of request or desire contained in a subsequent clause of the will. But this statement must refer to some such will as that then before the court where there were no other provisions tending to throw light upon the testator's intention. Here the language in article III is so plain a direction that it would do violence to it to say that the testator expressed but a mere wish or desire.

The decree is affirmed.

McLaughlin, J., and Buckles, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 26, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on July 25, 1905.

[No. 3. Sac. No. 1366. Third Appellate District.—May 31, 1905.]

In the Matter of the Estate of EMMA KOPPIKUS, Deceased. HENRY G. KOPPIKUS, Appellant, v. C. M. FITZGERALD, Executor, Respondent.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—EXPENSES OF ADMINISTRATION—MONUMENT PROVIDED FOR IN WILL.—An order was properly made to sell the real estate of a deceased testatrix to pay the expenses of administration and to carry out a provision in the will for the erection of a monument over the grave of the testatrix.

ID.—BURIAL WITH HUSBAND'S CONSENT—REMOVAL AND CREMATION TO DEFEAT SALE—PROVISION FOR MONUMENT NOT AFFECTED.—Where, with the consent of the husband, his deceased wife had been buried as provided for in her will, and had remained in her grave for over a year, his subsequent removal and cremation of the body pending a petition for sale of real estate to raise funds for a monument does not change the location of the grave so as to defeat the valid provision in the will for a monument over the grave.

ID.—MONUMENT AS FUNERAL EXPENSES.—The provision for the erection of the monument was legitimate and proper, and even where there is no testamentary disposition or direction therefor, the courts will allow a reasonable sum out of the funds of the estate for the erection of a monument, putting the expenditure on the ground of funeral expenses.

ID.—INDEFINITE PROVISION FOR CARE OF BURIAL LOT.—A provision for the care of the burial lot which is too indefinite and uncertain to be enforced cannot be properly included as a ground for an order of sale of real estate, and the order and judgment will be modified by striking out all reference thereto.

APPEAL from an order and judgment of the Superior Court of El Dorado County directing a sale of real estate. M. P. Bennett, Judge.

The facts are stated in the opinion of the court.

C. E. Peters, for Appellant.

George H. Thompson, for Respondent.

BUCKLES, J.—This is an appeal from an order and judgment directing a sale of real estate.

Emma Koppikus died testate March 31, 1903, leaving her surviving her husband, Henry G. Koppikus, her sole heir.

The reasons for the sale as set up in the petition, and found by the court, are to pay commissions of executor, \$280; attorneys' fee, \$250; for erecting a monument over the grave of testatrix, etc., \$1,000; and for paying \$100 to keep the grave, etc., in repair, making a total of \$1,630; and that the personal property is not sufficient to pay these amounts.

The court below made an order directing the sale to be made, and this is complained of and objected to on the following grounds: 1. That the direction in the will as to monument over the grave of testatrix is an attempt on the part of testatrix to dispose of her dead body by will, and is not a proper funeral expense; and 2. That there is no grave of testatrix wherein the remains of the said Emma Koppikus are interred, and that the remains were, by her said husband, caused to be cremated, and the ashes are not in the cemetery.

The court made findings, among which are the following, bearing upon the matters tried. The will is set out in full in finding III, and the part relating to the monument is as follows:—

"I desire that my body be buried from the Roman Catholic church of Georgetown and be laid to rest in the Georgetown cemetery, and that a monument of Scotch granite be erected over my grave and the lot to be surrounded with a granite curbing, the said monument and curbing to cost one thousand dollars. And I desire that the said lot be cared for and kept in order for at least twenty years after my death."

"FINDING IV.

"That in accordance with the desire of testatrix, expressed in the said will, she was buried on the — day of April, 1903, in the said Georgetown cemetery; that her burial in the said cemetery was with the full knowledge and consent of her husband, Henry G. Koppikus, who was present at her burial and grave and made no objection to her burial in said grave in the said Georgetown cemetery. . . . That the body of Mrs. Koppikus was buried as aforesaid in a private lot ten feet square, selected and paid for to the cemetery association by the executor of the said estate as such with the funds of the said estate.

"FINDING V.

"That on the — day of June, 1904, and subsequent to the filing of the petition herein by the executor for the order of

the court for a sale of real property, Henry G. Koppikus, the husband of said deceased, . . . caused the body of the said testatrix to be exhumed from her grave in said Georgetown cemetery . . . and caused it to be removed to Oakland and there cremated, and her ashes have not been returned to her said grave."

And, as conclusions of law, the court found that the request of testatrix in her will as to the burial of her body and monument over her grave at a cost of one thousand dollars, "is a valid and legal direction to her executor. . . . That by the burial of Mrs. Koppikus in accordance with the directions of her last will, in the Georgetown cemetery, by and with the consent of her said husband, her grave was there located and established. That the subsequent removal of her body from the said grave and the cremation of the same do not destroy the character of the original resting-place of her mortal remains as her grave, but the said spot where she was buried remains, for the purpose of carrying out the directions of her will, her grave. That the erection of a monument over the said grave and the construction of a curbing about the same will be a compliance with the directions of said will, and will require the expenditure of \$1000.00." And "that the expenditure of \$100.00 for the care of said lot for at least 25 years, if such expenditure can be made by the executor with adequate security that such care will be bestowed upon the said lot for said period, will be a legal expenditure of the funds of said estate and in compliance with the directions of said will."

The court thereupon made its order and judgment directing the sale to be made.

It is contended by the appellant that the testatrix, by the direction in her will, attempted to dispose of her dead body. But supposing she did so intend, her intention was carried into execution, not against the wish of her husband, who would have the right to dispose of it himself, but it was with his knowledge and consent that the body was buried in the Georgetown cemetery.

The case is unique, and we have failed to find any case similar in any of the books of reports. The husband allowed the said body of his wife to remain where it had been buried for over a year and made no move toward removing and

cremating it until after the petition was filed, by which the court was asked to direct a sale for the purpose of raising funds with which to erect the monument.

We think the court was committing no error when it said that her grave was located and established in the Georgetown cemetery, and that when, a year later, the husband removed the remains from the grave and had them cremated, the establishment and location of the grave was not changed so as to defeat the direction of the testatrix; that for all purposes of the will and the duty of the executor the grave remained the same, and for all purposes of this case became a certain, fixed, and definite place, a grave over which the executor must erect a monument as contemplated in the will.

As to the right of the testatrix to set apart one thousand dollars out of the money of her own separate estate with which to erect a monument over her grave, we think there can be no doubt. But as to the one hundred dollars for care of lot for twenty-five years, we think the court erred in its decree in that respect. The provision in the will is entirely too indefinite ever to be enforced. There can be no question as to the right of the testatrix to dispose of her own property as she may please, so long as the disposition was a legal one; and the erecting of a monument over the grave of a deceased person is a legitimate and proper act. (*Detwiller v. Hartman*, 37 N. J. Eq. 352; *Canfield v. Canfield*, 62 N. J. Eq. 578, [50 Atl. 471].)

Even where there is no testamentary disposition or direction that this be done, the courts will allow a reasonable sum to be paid out of the funds of the estate for the erection of a monument, putting the expenditure upon the ground of funeral expenses. (*Van Emon v. Superior Court*, 76 Cal. 589,¹ [18 Pac. 877].)

As it appears necessary that the real estate should be sold as prayed for in the petition, and for the reasons and purposes therein set forth, except as to the one hundred dollars for caring for the lot for twenty-five years, the order of sale and judgment appealed from are modified by striking out all reference to said one hundred dollars for caring for the lot, and such order and judgment thus modified are affirmed.

Chipman, P. J., and McLaughlin, J., concurred.

¹ 9 Am. St. Rep. 258.

A petition to have this cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on July 26, 1905.

[No. 4. Sac. No. 1367. Third Appellate District.—May 31, 1905.]

In the Matter of the Estate of EMMA KOPPIKUS, Deceased.
HENRY G. KOPPIKUS, Appellant, v. C. M. FITZGERALD, Executor, Respondent.

ESTATES OF DECEASED PERSONS—PETITION FOR DISTRIBUTION—PROCEEDING TO SELL REALTY.—While a proceeding for the sale of the real estate of a deceased testatrix is pending, in order to pay charges and funeral expenses, a petition by a sole heir for distribution of his share of the entire estate was properly denied.

ID.—PARTIAL DISTRIBUTION.—It was proper for the court to order a partial distribution of personal property under the provisions of the will.

ID.—CARE OF BURIAL LOT—IMPROPER ENFORCEMENT OF UNCERTAIN PROVISION IN WILL.—A part of the decree purporting to enforce an uncertain and indefinite provision in the will for an expenditure for care of a burial lot, which is not susceptible of enforcement, will be reversed.

APPEAL from an order, decree, and judgment of the Superior Court of El Dorado County. M. P. Bennett, Judge.

The facts are stated in the opinion of the court.

C. E. Peters, for Appellant.

George H. Thompson, for Respondent.

BUCKLES, J.—The appellant, Henry G. Koppikus, filed a petition as the only heir at law asking to have distributed to him the sum of twenty-five dollars, which is a specific devise in the will of deceased to Elmer Koppikus and assigned to petitioner, and asking the court to make an order distributing to him the share of said estate to which he is entitled.

Josephine Doyle, a legatee, petitions the court at the same time for an order distributing to her a certain diamond cluster cross which was devised to her by the said last will.

These petitions were heard together and the court by its order decreed that the said twenty-five dollars be distributed to the said Henry G. Koppikus, and that the said certain diamond cluster cross be distributed to the said Josephine Doyle, and this part of the order, decree, and judgment is affirmed.

That part of the petition of the said Henry G. Koppikus asking a distribution to him of his distributive share of said estate was denied, on the ground, as we understand, that there was then pending an application for sale of the real estate to raise the funds necessary to pay charges and funeral expenses, and therefore no distribution of the kind asked could be made. We have this day affirmed the order of sale of real estate in said matter (No. 3 Sac. No. 1366, *ante*, p. 84).

The order, decree, and judgment are therefore affirmed as to the part denying distribution.

The order, decree, and judgment contains the following recital: "It is further adjudged and decreed that the expenditure of one hundred dollars for the care of said lot for at least 25 years, if such expenditure can be made by the executor with adequate security that such care will be bestowed upon the said lot for said period, will be a legal expenditure of the funds of said estate and in compliance with the direction of said will."

This provision, being based upon what we deem a direction of the will which cannot be enforced because of being uncertain, and the decree itself making the enforcement more uncertain and indefinite, is reversed.

As so modified the order, decree, and judgment are affirmed.

Chipman, P. J., and McLaughlin, J., concurred.

[No. 8. Third Appellate District.—May 31, 1905.]

LAWRENCE H. BITHER, Respondent, v. ANDREW CHRISTENSEN, and UNITED STATES FIDELITY GUARANTY COMPANY, Appellants.

FORECLOSURE OF MORTGAGE—MATURITY OF NOTE—DELIVERY AFTER DATE—TIME OF PAYMENT OF INSTALLMENTS—OPTION—FINDING—APPEAL FROM JUDGMENT.—Upon appeal on the judgment-roll alone from a judgment foreclosing a mortgage, where the court found that the note and mortgage were delivered in escrow, and finally delivered a month after their date, but also found that the time for payment of each installment "was according to the intention and agreement of both parties, to be computed according to the terms of the writing itself and after the date on the face of the note," and found a default accordingly, and an option, exercised as agreed, to declare the whole note due, when the action was commenced, it was competent for the parties so to agree, and it must be assumed that the evidence supported the findings.

APPEAL from a judgment of the Superior Court of Mendocino County. J. M. Mannon, Judge.

The facts are stated in the opinion of the court.

W. Rigby, Rigby & Rigby, and T. L. Carothers, for Appellants.

Seawell & Pemberton, for Respondent.

CHIPMAN, P. J.—Foreclosure of mortgage. Plaintiff had judgment, from which defendants appeal on the judgment-roll alone. The only question presented is the claim of defendants that the action was prematurely brought.

From the findings of the court it appears that on August 8, 1898, plaintiff, defendant Christensen, and one Copey entered into an agreement by which Christensen agreed to purchase certain lands, situated in Mendocino County, owned by plaintiff and Copey as tenants in common, being the premises described in the complaint; that in payment to Copey for his interest therein said defendant should convey to him certain real property in San Francisco, and in payment to plaintiff for his interest therein he should pay plaintiff the sum of two thousand dollars five years after date, with in-

terest thereon from said date at the rate of six per cent per annum, payable semiannually, the payment of the same to be secured by mortgage on the premises described in the complaint; that the note evidencing said payment and the mortgage securing the same were to be at once delivered to one Pemberton "to be held by him and withheld from record and from absolute delivery until such time as the said Christensen and the said Copsey should have time to investigate the title to the properties to be respectively conveyed and to be respectively satisfied regarding such titles"; and upon being so satisfied Pemberton was to make delivery of said note and mortgage to plaintiff, pursuant to which agreement the note and mortgage were executed and left with Pemberton; thereafter, on or before September 3, 1898, Christensen declared himself satisfied with the title, and although informed that the title to a portion of the land was not perfect, "he insisted on the sale being fully consummated, and agreed to accept the deed to said lands as conveying sufficient title thereto," and directed Pemberton to complete the delivery of the said note and mortgage, and thereupon, "all the parties to the said transaction consenting thereto," Pemberton delivered the note and mortgage to plaintiff. It is further found that Christensen, with full knowledge of all the facts affecting the title of the portion of the land as to which title was not perfect, conveyed the San Francisco property to Copsey and insisted on having the lands, as to which the title was imperfect, included in said mortgage. It is further found "that the time of payment of each installment of [as] provided for in said promissory note was according to the intention and agreement of the parties to be computed according to the terms of the writing itself; that is, of the terms of said promissory note; that the installments of interest fall due thereunder on the 8th day of February and 8th day of August in each year respectively after the date on the face of the note." It is further found that the mortgage provided in case of default in the payment of any installment of interest, "the whole principal and interest shall be due at the option of the holder of the said obligation"; that plaintiff exercised his option on February 12, 1901, on which day he commenced this action; that defendant Christensen did not, before the commencement of this action, tender to plaintiff

any installment of interest due under the terms of said note and mortgage other than the installments due August 8, 1900, and prior thereto, which by the complaint are admitted to have been paid.

Appellants contend that the interest became due March 3d and September 3d, instead of February 8th and August 8th, as found by the court. Appellants rely on *Collins v. Driscoll*, 69 Cal. 550, [11 Pac. 244], (and other cases to like effect,) where it was held that the statute of limitations begins to run against a promissory note from the date of its actual delivery, and not from the date it bears. And it was there said: "Whatever may be its date, a note takes effect only on 'delivery.'" But it was also said: "A note may be antedated or postdated, and 'where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument.'" (Citing Story on Promissory Notes, sec. 48; *Paige v. Carter*, 64 Cal. 489, [2 Pac. 260].)

The court found that the time of payment of each installment of the interest on said note "was according to the intention and agreement of both parties to be computed according to the terms of the writing itself" and that "the installments fall due thereunder on the 8th day of August of each year respectively after the date on the face of the note."

It was perfectly competent for the parties to so agree, and we must assume that the evidence supported this finding.

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

[No. 20. Third Appellate District.—May 31, 1905.]

F. H. IDOL, Respondent, v. SAN FRANCISCO CONSTRUCTION COMPANY, Appellant.

ACTION UPON CONTRACT—TRANSPORTATION OF LABORERS—CONFLICTING EVIDENCE—APPEAL.—In an action upon a contract to pay for the transportation of laborers, where the evidence is conflicting as to whether the number of laborers were to be paid for who were placed on wagons and stages and waybilled to the camps of the defendant, as claimed by plaintiff, or whether it was the number of men

delivered at the camps and received by the defendant, and the court found in favor of plaintiff, the finding will not be disturbed upon appeal.

ID.—ACCOUNT-BOOK—ORIGINAL ENTRIES—COPIES FROM WAYBILLS—IMMATERIAL ERROR—INDEPENDENT EVIDENCE.—An account-book kept by the plaintiff, in so far as it contained original entries as to the number of men transported, was admissible in his favor; though where, after a certain date, the names were copied therein from the waybills, the waybills constituted the original entries. But any error in admitting the book as to such copies instead of the waybills was immaterial, where there was independent, uncontradicted evidence of the transportation of a specified number of men for which plaintiff was not paid.

APPEAL from an order of the Superior Court of Mendocino County denying a new trial. J. M. Mannon, Judge.

The facts are stated in the opinion of the court.

Wm. H. Chapman, for Appellant.

Thomas L. Carothers, for Respondent.

BUCKLES, J.—The appeal comes up from the order of the lower court denying the appellant's motion for a new trial.

An agreement was entered into between the respective parties whereby the defendant agreed to pay the plaintiff the sum of one dollar each for carrying men from Ukiah to its camps along the line of the extension of the California and Northwestern Railway Company from Ukiah to Willits. There is a conflict in the evidence as to whether the number of laborers were to be paid for who were placed on the wagons and stages, waybilled to the camps of the defendant, or whether it was the number of men who should be delivered at the camps and received by defendant. The court held that plaintiff's contention was correct, and in this court, under the well-settled rule that where there is a substantial conflict in the evidence, the judgment will not be disturbed.

The other assignments of error are as to the introduction of an account-book. The plaintiff had testified that "there was due him on the agreement the sum of \$442.00, and that much is unpaid at the rate of \$1.00 a head." Another witness stated that "442 had been hauled that had not been paid for."

In rebuttal of this, the defendant showed that the number had not been *received*. Considering that the agreement was that all who were taken in the vehicles, waybilled for defendant's camps as the basis for charging one dollar, then the evidence produced by plaintiff is sufficient to establish the fact that he transported 442 men for which he was not paid.

But the question arose as to the whole number of men hauled from Ukiah, and to ascertain this a book of plaintiff was produced, and plaintiff testified that it was the book in which he entered the names, in his hand, of the men he sent out on his stage and from the statement of the man as to name, etc., each day, up to September 17th, and after that he copied the names in the book from the waybills and at the time, the very day the men were hauled, and that the book was correctly kept—that is, that up to September 17th he was absolutely certain that the book contained a correct statement of the name of every man hauled, and that after that time it contained a correct account of every man on the waybills for defendant's camps, and witness Carothers, who was in plaintiff's employ and made out the waybills, testified that he put the names of all these men on the waybills.

The book was the book of original entry up to September 17th, the entries made therein by the plaintiff at the time of the transaction, and was properly introduced in evidence for the purpose of showing the number of men sent out to that date. But after September 17th the waybills constituted the "original entry," and they are not the book to which their contents were transcribed. But whether it was error to introduce the book instead of the waybills is immaterial, because plaintiff's evidence as to the number of passengers not paid for was uncontradicted.

Judgment is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 30. S. F. No. 3189. First Appellate District.—May 31, 1905.]

J. C. MURPHY, Respondent, v. F. E. STELLING, Appellant.

APPEAL—MOTION TO DISMISS—LAW OF CASE.—Where a motion to dismiss an appeal on the ground that the order appealed from was not appealable was denied, the order denying it is the law of the case, and a subsequent motion to dismiss the appeal on the same ground cannot be granted, but the appeal must be determined upon its merits.

NEW TRIAL—ORDER REFUSING TO SETTLE STATEMENT FOR DEFAULT IN PRESENTATION—MOTION FOR RELIEF—DISCRETION.—A motion for relief, under section 473 of the Code of Civil Procedure, from an order refusing to settle a proposed statement on motion for new trial, and dismissing the proceedings for default in presentation of the statement and amendments within the time limited, is addressed to the sound discretion of the court, and where it cannot be said, upon the facts disclosed by the record, that the trial court abused its discretion in denying the motion for such relief, its order will be affirmed.

1b.—NEGLECT OF MOVING PARTY.—Where it appears that all the facts upon which the motion for relief was founded were known to the moving party three weeks before the hearing of the grounds for objection to the settlement of the statement, and he then put in no evidence to contradict the evidence of the opposite party as to his neglect, without any reason disclosed in the record to present such matters to the court at that hearing, it cannot be said that the court committed error in denying the motion.

APPEAL from an order of the Superior Court of Santa Clara County denying a motion for relief from a previous order. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

John B. Kerwin, for Appellant.

Nicholas Bowden, for Respondent.

HALL, J.—This is an appeal by defendant, F. E. Stelling, from an order made by the trial court denying appellant's motion, made under section 473 of the Code of Civil Procedure, to be relieved from an order theretofore made, refusing to settle appellant's proposed statement on motion for a new trial and dismissing said proceedings.

Counsel for respondent moves that the appeal be dismissed on the ground that the order appealed from is not appealable, but he has heretofore made the same motion, which was denied. (*Murphy v. Stelling*, 138 Cal. 641, [72 Pac. 176].) The order denying his motion to dismiss has become the law of the case, and makes it necessary to determine the appeal on its merits.

The record before us shows that after judgment for plaintiff, defendant in due time gave notice of intention to move for a new trial on a statement to be thereafter settled; that the proposed statement was served on respondent in due time, and on the fifteenth day of September, 1900, (also in due time,) respondent served his proposed amendments thereto; that thereafter, during the month of October, 1900, the settlement of said statement was stricken from the calendar, and was subsequently restored on the eighth day of November, 1901, by consent; that thereafter plaintiff objected to the settlement of the said proposed statement on motion for a new trial on the grounds and for the reason that said proposed statement and said proposed amendments were not and had not been presented by the moving party to the judge who tried the cause, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge within the time required by law, and that the court had no jurisdiction to settle said proposed statement; that thereupon the hearing of said matter and said objections was, on motion of said defendant, F. E. Stelling, continued to the eighteenth day of November, 1901.

Said matter and the hearing thereof was again continued by the court to the ninth day of December, 1901, at the request of plaintiff.

On this last-named day plaintiff filed and presented in evidence the affidavits of Pfister, the clerk, and of Shilue, Schilling, Sex, Atgues, and Denker, his deputies, together with the indorsement on the said proposed statement and amendments as follows: "Received Sept. 28, 1900. Henry A. Pfister, Clerk, by J. M. Shilue, Deputy Clerk."

The affidavits above referred to are incorporated in the bill of exceptions, and strongly tend to show that the proposed statement and the amendments were left with the clerk September 28, 1900, and not before. This was three days too

late. The defendant did not offer any evidence at all on this hearing, but after argument of the respective counsel the matter was submitted to the court for decision; and thereafter, on the twenty-third day of December, 1901, the court sustained said objections of said plaintiff to the settlement of said statement, and ordered that the matter of said settlement be dismissed.

Thereafter, on the twenty-sixth day of December, 1901, appellant served and filed a notice of motion to be relieved from the order of December 23, 1901, and that said statement on motion for a new trial be settled, on the ground that said order of December 23, 1901, was taken and obtained by plaintiff and entered against defendant by reason of the mistake, inadvertence, and excusable neglect of defendant's attorney, etc.

With this motion were filed affidavits of defendant's attorney and of the clerk and of the deputy who had indorsed the statement as received September 28, 1900.

On the hearing of defendant's motion the said last-mentioned affidavits were read and oral testimony given by two other deputy clerks. Plaintiff again read in evidence the same affidavits that he had used on the hearing of his objections to the settlement of the proposed statement. The court denied defendant's motion, and the question is now presented, Did the court commit error in so doing?

The affidavit of counsel for defendant tends to show that he did in fact deliver the proposed statement and the amendments to some employee of the clerk in the office of said clerk on September 21, 1900; and contains statements as to sickness under which defendant's counsel labored during the year 1900, engagements of the court and counsel for plaintiff during the same year, and of the fact that a portion of the delay in bringing the matter of the settlement of the statement on for hearing was due to the engagements of plaintiff's counsel, and at his request, and the like, all of which might well have been presented to the court by appellant on the hearing of respondent's objection to the settlement of the statement, but was not. Although defendant's counsel was apprised of the grounds of respondent's objections at some date between November 8, 1901, and November 18, 1901, and,

according to his own affidavit, was informed on November 18, 1901, of the indorsement on the statement, showing its receipt by the clerk September 28, 1900, when the said matter and said objections came on to be heard on December 9, 1901, he made no effort to contradict or to avoid in any way by evidence the effect of any of the evidence offered by plaintiff. He did not ask for a continuance to prepare affidavits, although every person whose affidavit was used by plaintiff was a clerk of the court, and every person whose affidavit or evidence was subsequently used by defendant on his motion to be relieved from the order of December 23d was one of the same clerks or counsel for defendant. No fact was attempted to be proved by defendant on the hearing of his motion that might not as well have been proven by him on the hearing of plaintiff's objections December 9, 1901, and no reason was given in the affidavit of counsel for defendant, or otherwise, why the matters that he relied on for relief from the order of December 23, 1901, were not presented at the hearing on December 9, 1901.

In *Stonesifer v. Kilburn*, 94 Cal. 33, [29 Pac. 332], the party in default made application for relief under section 473 before any steps had been taken for settling the bill of exceptions; and on the hearing the trial court found that the bill had not been filed in time, by reason of mistake, inadvertence, and excusable neglect, etc., yet being of the opinion that it had no jurisdiction to settle the bill, refused to settle it. This order was reversed.

In *Banta v. Siller*, 121 Cal. 415, [53 Pac. 935], the proposed statement came up for hearing in the trial court March 16th, and upon objection of respondent the court refused to settle the same. On the same day appellant served notice to be relieved from the order refusing to settle the statement, and the court granted the motion, and the appeal was from the order granting the motion to be relieved. On the appeal it was held that in granting such relief the court certainly did not abuse its discretion. So in this case, if the court had granted the relief it may be that we would have been unable to say that it had abused its discretion in so doing. Nevertheless we do not think that under the facts of this case we can say that the court abused its discretion in *refusing* to grant appellant's motion to be relieved from the order of December 23, 1901. The order of December 23d seems to have been clearly justified on the evidence then before the

court, as the appellant, though fully advised three weeks before the hearing of the grounds of the objections to the settlement of the statement, put in no evidence to contradict the evidence of respondent. The real matter to be determined by the court under the objections of plaintiff at the hearing on December 9, 1901, was, Should the court settle the statement, or should it refuse to do so? Of the grounds of plaintiff's objections to the settlement of the statement defendant had been fully advised as early as November 18, 1901; and all the facts upon which he subsequently relied to secure relief from the order that resulted from the hearing on December 9, 1901, were known to defendant's counsel on and before said hearing; and yet he failed, without any reason disclosed in the record, to present such matters to the court at that hearing. The matter of granting relief under section 473 is largely a matter of discretion with the trial court.

We cannot say, under the facts as disclosed by the record in this case, that the trial court abused its discretion or committed error in denying appellant's motion.

The motion to dismiss the appeal is denied. The order appealed from is affirmed.

Cooper, J., and Harrison, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 30, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on July 25, 1905.

[No. 21. First Appellate District.—June 1, 1905.]

C. S. OLSEN, Respondent, v. W. H. BIRCH & CO. et al.,
Defendants; HERMAN ZADIG, and JAMES SMITH,
Appellants.

**FORECLOSURE OF LIENS ON VESSEL—STAY-BOND ON APPEAL—VOID BOND
—ERRONEOUS JUDGMENT AGAINST SURETIES.**—Upon appeal from a
judgment against the owners of a vessel foreclosing liens against the

vessel and providing for a sale of the vessel, with engines, boilers, tackle, apparel, and furniture, under the provisions of section 813 et seq. of the Code of Civil Procedure, the ordinary bond on appeal is sufficient to stay execution, and a stay-bond given under section 942 of the Code of Civil Procedure in twice the amount found due is without consideration and void, and a judgment against the sureties thereupon must be reversed.

Id.—SHOWING OF ERROR—SERVICE OF BILL OF EXCEPTIONS.—Where the erroneous judgment against the sureties on the void stay-bond appears on the face of the judgment-roll, exclusive of the bill of exceptions, it is immaterial whether the bill of exceptions was not served in time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

E. L. Campbell, J. S. Spilman, and A. A. Sanderson, for Appellants.

H. W. Hutton, for Respondent.

COOPER, J.—Plaintiff recovered a judgment of foreclosure and sale against defendants, W. H. Birch & Co. and the Yukon and Northwestern Dredging and Transportation Company, as owners of the steamship City of Dawson for the foreclosure of certain liens against the said vessel, under the provisions of chapter 6, sections 813 et seq., of the Code of Civil Procedure, relating to actions against steamers, vessels, and boats.

The defendants appealed from the judgment and decree so made, and gave an undertaking, with appellants as sureties, in double the amount of the judgment, for the purpose of staying execution thereon. The judgment was affirmed on appeal (133 Cal. 479,¹ [65 Pac. 1032]), and upon filing the *remittitur* in the court below, on motion of counsel for plaintiff, judgment was ordered and entered without notice against the appellants as sureties on said undertaking for the amount of the judgment with interest and costs. From this judgment this appeal is taken.

The sole question is as to whether there was any consideration for said undertaking. If there was no consideration the sureties are not liable, and the judgment must be reversed.

¹ 85 Am. St. Rep. 215.

In the judgment of foreclosure, which was the subject of the former appeal, it was decreed that plaintiff have judgment against the Yukon and Northwestern Dredging and Transportation Company for the sum of three hundred and eighty dollars, besides interest and costs, which judgment provided "that the steamship City of Dawson, her engines and boilers, tackle, apparel, and furniture are liable for the payment of said sums, and it is further ordered that the sheriff of the city and county of San Francisco, state of California, be and he is hereby ordered and directed to sell the said steamer, her said engines and boilers, tackle, apparel, and furniture in the manner provided by law, and out of the proceeds arising from such sale he retain his fees, disbursements and commissions," and pay to plaintiff the amount so found to be due him, with costs.

The contention of plaintiff is, that this judgment is one which "directs the payment of money" within the meaning of section 942 of the Code of Civil Procedure, and that there should have been given, and the undertaking was given, in twice the amount of the judgment, and stayed the execution of the judgment pending the appeal.

If the judgment obtained in the foreclosure proceedings was a judgment directing the payment of money within the meaning of the section quoted, then the appeal bond is supported by a valid consideration, but we do not think it was such judgment.

It was found that the steamship City of Dawson, her engines, boilers, tackle, etc., were liable for the payment of the amount due plaintiff. No personal judgment is directed to be entered. In *Owen v. Pomona Land etc. Co.*, 124 Cal. 331, [57 Pac. 71], the decree directed that plaintiff recover judgment against defendant for the amount of the several sums of money named, and that the land and stock be sold, and the proceeds applied to the payment of the amount found due. The court held that it was not a judgment directing the payment of money within the meaning of section 942, and in the opinion it said: "This language considered by itself certainly does sustain the contention of respondent. But it cannot be taken by itself disconnected from other parts of the decree, and when the whole decree is read together it is found to be in substance an ordinary decree of foreclosure, in which

certain property is ordered sold and its proceeds applied upon an ascertained debt." The case of *Central Land etc. Co. v. Center*, 107 Cal. 193, [40 Pac. 334], is to the same effect.

In speaking of a judgment for the direct payment of money under section 942, the court said, in *Kreling v. Kreling*, 116 Cal. 460, [48 Pac. 383]: "That section is applicable to a judgment which directs payment by the defendant of a specific amount of money, and which can be directly enforced by a writ of execution, but has no application to a judgment which may be satisfied in either of two or more modes, or which cannot be enforced against the defendant until after the plaintiff has exhausted another remedy, and when he is liable for only a deficiency in the proceeds of certain property which is primarily chargeable therefor."

Section 949 of the Code of Civil Procedure provides: "In cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in section 941, stays proceedings in the court below upon the judgment and order appealed from." The section excepts certain cases of which this is not one.

The three-hundred-dollar undertaking provided for in section 941 as to damages and costs was given.

Section 943 provides that judgments directing the assignment or delivery of documents or personal property, and judgment directing a sale of personal property upon the foreclosure of a mortgage thereon, may be stayed by the things required to be assigned or delivered being placed in the custody of such officer or receiver as the court may appoint, or by executing an undertaking in an amount to be fixed by the court or a judge thereof and in the manner prescribed as to the particular judgment. Section 944 provides that a judgment directing the execution of a conveyance may be stayed by the execution of the conveyance and depositing it with the clerk.

Section 945 provides that if the judgment direct the sale or delivery of the possession of real property, it may be stayed by executing an undertaking to the effect prescribed in the section and in the amount fixed by the court.

We are unable to escape the conclusion that as this case is not one provided for in either of the sections referred to in section 949, the perfecting of the appeal by giving the three-hundred-dollar undertaking stayed proceedings in the court below pending the appeal. The undertaking executed by appellants was unnecessary and did not stay the execution, and worked no detriment or injury to plaintiff. Appellants received nothing for executing and giving the undertaking. Plaintiff did not agree to forbear, or do any other act to his injury.

In *Powers v. Chabot*, 93 Cal. 266, [28 Pac. 1070], a judgment had been obtained for the foreclosure of a chattel mortgage. On appeal, in addition to the three-hundred-dollar bond, a stay-bond in double the amount of the judgment was given. It was held that the bond was without consideration and void as to the sureties. The court said: "The undertaking was not given in pursuance of any agreement between the parties, but simply to secure a statutory privilege. It did not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common-law undertaking."

In *Owen v. Pomona Land etc. Co.*, 124 Cal. 333, [57 Pac. 71], the judgment of the court below for certain sums of money was declared to be a lien upon certain land and water stock. An undertaking in proper form was given for three hundred dollars, but no separate undertaking to stay proceedings. The court said: "On the whole, it appears that this is a case not covered by any provision of the statute for the filing of an additional stay-bond, and proceedings on the judgment were therefore stayed by the ordinary undertaking on appeal."

It has been universally held that a stay-bond, where none is required, in cases similar to this, is without consideration and void. (*Estate of Kennedy*, 129 Cal. 385, [62 Pac. 64]; *Central Land etc. Co. v. Center*, 107 Cal. 193, [40 Pac. 334]; *Reay v. Butler*, 118 Cal. 113, [50 Pac. 375]; *McCallion v. Hibernia etc. Society*, 98 Cal. 443, [33 Pac. 329].)

Plaintiff claims that the bill of exceptions as to the appellant Smith cannot be considered, because it was not served and filed within the time allowed by law.

But if it be conceded that the bill of exceptions was not

served in time, the judgment-roll, exclusive of the bill of exceptions, shows the error relied on.

The judgment against appellants is reversed.

Hall, J., and Harrison, P. J., concurred.

[No. 22. First Appellate District.—June 1, 1905.]

In the Matter of the Estate of N. D. THAYER, Deceased.
M. J. LAYMANCE, Appellant, v. DENTON UTTER,
Executor, Respondent.

ESTATES OF DECEASED PERSONS—ORDER SETTTLING FINAL ACCOUNT—APPEAL—RECORD—DOCUMENTS NOT EMBODIED IN BILL OF EXCEPTIONS—JURISDICTION.—Upon appeal from an order settling the final accounts of an executor, where the record contains only the order settling the account, without a bill of exceptions, documents printed in the transcript consisting of a decree of partial distribution, a notice of appeal therefrom, and a *remititur* reversing the decree, filed after the order settling the account, cannot be considered as showing that the court had no jurisdiction to settle the final account pending such appeal.

Id.—ACCOUNT NOT IN RECORD—PRIOR PARTIAL DISTRIBUTION—PRESUMPTION—JURISDICTION PENDING APPEAL.—A decree settling the final account of an executor does not necessarily involve any question respecting the distribution of the estate; and where the account does not appear in the record, but only the order settling it, it must be presumed to contain no account of any payment made under a prior decree of partial distribution appealed from, but only accounts of receipts and payment of debts of the decedent and expenses of administration, of which the court would have jurisdiction regardless of such appeal.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the first account of an executor. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

A. A. Sanderson, for Appellant.

James H. Boyer, for Respondent.

HALL, J.—This is an appeal by M. J. Laymance, who is described in his notice of appeal as “a party in interest in said estate, and assignee of Mary L. Flick, one of the legatees and devisees under the last will and testament of said N. D. Thayer, deceased,” from an order settling the final account of the executor.

The transcript contains no bill of exceptions or statement authenticated in any way by the judge of the trial court, but contains certain documents certified to by the clerk, as follows:—

1. A decree of partial distribution to M. J. Laymance, dated and filed February 27, 1903.

2. A notice of appeal by the executor and certain legatees from said decree, dated and filed March 6, 1903.

3. The order settling the final account of the executor, dated and filed April 15, 1904, (which is the order from which this appeal is prosecuted).

4. *Remittitur* (setting out judgment of supreme court reversing decree of partial distribution), dated April 11, 1904, and indorsed “Filed April 16, 1904.”

5. Notice of appeal, filed June 14, 1904, and the certificate of clerk that an undertaking on appeal in due form was filed.

Appellant in his brief states that “The sole question involved in and by this appeal concerns the power and jurisdiction of the said superior court to make and enter an order in said estate, settling and allowing the final account of the executor *prior* to the filing of the said *remittitur* in the superior court.”

We are of the opinion that such question is not properly presented by the record before us. It has been held that the judgment-roll on an appeal from an order settling the account of an executor consists of the petition and account, and reports accompanying same, objection and exceptions thereto (if any), findings of the court (if any), and order settling account. (*Estate of Isaacs*, 30 Cal. 106; *Estate of Page*, 57 Cal. 238; *Müller v. Lux*, 100 Cal. 609, [35 Pac. 345, 639].) The only one of these documents contained in this transcript is the order settling the account, and while there are also set forth a decree of partial distribution, a notice of appeal therefrom, and the *remittitur*, they are not contained in a

bill of exceptions, as required by rule XXIX. (See, also, *Nash v. Harris*, 57 Cal. 242; *Herrlich v. McDonald*, 80 Cal. 472, [22 Pac. 299].) We therefore on this appeal can properly take notice only of the order settling the account, which on its face does not disclose the fact relied on as showing that the court had no jurisdiction to settle the account.

But if it be conceded that on the record before us we may examine the various documents contained in the transcript, we are of the opinion that the court had jurisdiction to settle the account.

The matter of settling the final accounts of an executor or administrator does not necessarily involve the matter of distribution of the estate at all. Distribution of the estate to the heirs or legatees may take place upon the settlement of the final account or at any subsequent time. (Code Civ. Proc., sec. 1665.) One or the other of these is the usual course, though the law allows under certain conditions a partial distribution before the settlement of the final account. (Code Civ. Proc., secs. 1658, 1661.) A perfected appeal "stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; . . . but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." (Code Civ. Proc., sec. 946.) Upon an order simply settling a final account no matter concerning the distribution of an estate would be necessarily determined. The account rendered in this case is not in the transcript, and we must therefore assume that it contained no account of any payment made under or in connection with the order of partial distribution, but only accounts of receipts and payments of debts of decedent and expenses of administration, which are matters proper to be considered in a final account. These matters are not affected by or embraced in a decree of partial distribution. It certainly is not shown that the court, by its order settling the final account of the executor, determined any matter that it did not have jurisdiction to determine at that time. It in no way appears that any payment under the decree of partial distribution, or any expense incurred in connection therewith, was presented by the final account.

Though a decree of distribution and a decree settling a final account are sometimes embraced in one decree of court, the

decree settling a final account need not necessarily in any way affect the manner of the distribution of the estate.

The decree settling final account is affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 20. First Appellate District.—June 2, 1905.]

SOCIETA DI MUTUO SOCCORSO, Respondent, v. MAX MANTEL et al., Appellants; and F. FIGONE et al., Respondents.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ORDER DIRECTING GARNISHEE TO PAY JUDGMENT-CREDITORS—RES ADJUDICATA.—An order in proceedings supplementary to execution directing a garnishee to apply a sum due to the judgment-debtor to be paid to the judgment-creditors is in effect a judgment which, if not appealed from, is *res adjudicata* and conclusive in any other action between the garnishee and the judgment-creditors.

ID.—ACTION BY GARNISHEE TO DETERMINE CONFLICTING CLAIMS—DEFENSE.—In an action by the garnishee to determine conflicting claims between an assignee of the claim and the judgment-creditors, the pleading and proof by the judgment-creditors of the supplementary proceedings as an estoppel against the garnishee constitutes a complete defense against the right of the garnishee to withhold the money from them or to pay it to any other party.

ID.—JUDGMENT FOR ASSIGNEE—OMISSION TO FIND UPON MATERIAL ISSUES—DECISION AGAINST LAW—REVERSAL OF NEW TRIAL ORDER.—Where the answer also pleaded that the assignee had notice of the supplementary proceedings, and by failing to attend upon the same was estopped thereby, the failure to find upon the averments of the answer as to the supplementary proceedings in rendering judgment for the assignee and against the judgment-creditors was a decision against law, for which an order denying a new trial must be reversed.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

George E. Lawrence, for Appellants.

A. D. Splivalo, for George Figone, Respondent.

Devoto, Richardson & Long, for Plaintiff-Respondent.

HARRISON, P. J.—In the complaint herein the plaintiff alleges that in 1896 the appellants Mantel et al. recovered a judgment in the superior court of San Francisco against their co-defendant Figone for \$2,230, upon which an execution was issued, by virtue of which the sheriff of San Francisco levied upon any moneys in their hands that might be owing from them to said Figone, and that the said execution was thereafter returned wholly unsatisfied; that in January, 1900, Figone recovered a judgment against the plaintiff in said superior court for the sum of sixty-three dollars; that the defendant Splivalo claims that the moneys so adjudged to be due from it to Figone were assigned to him prior to the entry of said judgment, and prior to the levy of the execution in favor of the appellants; and that since said assignment he has been the owner thereof, and claims that he is entitled to receive the amount of said judgment from the plaintiff; that it still has said money and is ready and willing to pay it to the one entitled thereto, but that by reason of the said conflicting claims it does not know to whom it should pay the same. It therefore asked that all of the defendants appear and set forth their respective rights to the said money, and that the court determine which party is entitled to the same.

The appellants answered the complaint, setting forth certain facts, showing the judgment in their favor against Figone, and that after the garnishment upon the plaintiff by virtue of said judgment they had instituted proceedings supplementary to the execution issued thereon, and that in such proceedings the superior court had determined that the plaintiff was indebted to Figone in the sum of sixty-three dollars, and had made an order that the plaintiff immediately pay said sum of money to these appellants, in partial satisfaction of their judgment against Figone; that said order had not been appealed from or set aside, but was in full force and effect, and had become final. That by reason thereof the plaintiff is estopped from denying its indebtedness to them in said sum of sixty-three dollars, and from alleging that there is any controversy as to whom it should pay the same. They also

allege that the defendant Splivalo has no right to or interest in said money; that he had knowledge and notice of said supplementary proceedings, and refused to attend or be present at the examination therein of the plaintiff, and that by reason thereof he is estopped from making any claim thereto, and from denying that they are entitled to receive the same. The defendant Splivalo, in his answer to the complaint, alleged that he was the holder and owner of the judgment in favor of Figone against the plaintiff by virtue of an assignment from Figone prior to its entry of the claim upon which it was rendered.

At the trial of the cause the court found that the appellants had obtained the said judgment against Figone, and that under an execution issued thereon a garnishment had been served upon the plaintiff covering all moneys due or owing from it to Figone; that prior to the date of said judgment Figone had assigned to the defendant Splivalo his claim against the plaintiff upon which an action was then pending, and that in January, 1900, judgment had been rendered thereon by the superior court in favor of Figone for the sum of sixty-three dollars.

Upon these findings of fact the court rendered judgment that the plaintiff pay to Splivalo the amount of the judgment against it, and that it recover its costs from the appellants.

The appellant moved for a new trial upon several grounds, and the said motion, taken upon a bill of exceptions, was denied. From this order the defendants Mantel have appealed—the principal grounds urged upon the appeal being that the decision was against law in that the court failed to make findings upon certain material issues of fact presented by their answer, especially that it made no finding of fact upon the issues presented by their allegations setting up the proceedings supplementary to execution upon their judgment against Figone.

At the trial these appellants offered in evidence the record of their supplementary proceedings, and an order of the court made therein directing the plaintiff to pay to them the said sum of sixty-three dollars, to be applied towards the satisfaction of their judgment against Figone; and that said payment should be and operate as a satisfaction of the judg-

ment recovered by Figone against it, which Splivalo claimed had been assigned to him. This evidence is not shown to have been qualified by any other evidence, and the appellants were entitled to a finding thereon if the facts thereby established were material to the issues before the court, and if the effect of such finding would be to invalidate the judgment rendered upon the other findings. (See *Winslow v. Gohransen*, 88 Cal. 450, [26 Pac. 504].)

The order of the superior court made in the supplementary proceedings, directing the payment by the plaintiff to these appellants of sixty-three dollars was "the final determination of the rights of the parties in the proceedings, and in effect constituted a judgment on which an execution might have been issued and from which an appeal might have been taken." (*Bronzan v. Drobaz*, 93 Cal. 647, [29 Pac. 254].) No appeal having been taken therefrom, and the time for such appeal having expired, the order had become final. It was therefore *res adjudicata* as between the plaintiff herein and the appellants, and estopped the plaintiff from disputing its liability to these appellants in any other action. (See *McCullough v. Clark*, 41 Cal. 298.) The averments in the answer of the appellants upon this point raised a material issue between them and the plaintiff, and, if found by the court to be established by evidence, would constitute a defense to any right of the plaintiff to withhold the money from them or to pay it to any other party; and they were entitled to a finding upon the truth of these averments. If such finding had been made in accordance with their claim it would have countervailed the other findings made by the court, and necessitated a judgment against the plaintiff and in their favor for the said sum of sixty-three dollars. The judgment rendered by the court without making any finding thereon was therefore a decision against law, for which appellants were entitled to a new trial.

The order appealed from is reversed, and the superior court is directed to grant a new trial.

Cooper, J., and Hall, J., concurred.

[No. 29. First Appellate District.—June 2, 1905.]

MARGARET STODDARD, Administratrix, etc., Respondent, v. MARY NEWHALL and CARL NEWHALL, Appellants.

REPLEVIN BY ADMINISTRATRIX—EVIDENCE—DECLARATION OF DECEASED AGAINST INTEREST.—In an action by an administratrix to recover tools in possession of the decedent as the property of his estate, where the defendant was the mother of the decedent and testified that the tools belonged to her, that her son was employed as foreman in her orchard and kept the tools at his house as matter of convenience, it was error to exclude evidence of the declarations of the deceased against his interest in support of the defendant's testimony. The declarations were admissible against the plaintiff, who, in her capacity as administratrix, is successor in interest of the deceased, within the meaning of section 1853 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

James R. Lowe, and L. B. Archer, for Appellants.

W. A. Bowden, for Respondent.

COOPER, J.—This action was brought by plaintiff as administratrix for the recovery of a large number of articles of personal property of the estate of plaintiff's intestate, which the defendants are alleged to have taken possession of and conveyed away, and for damages in double the value of the property so taken. Judgment was rendered in favor of plaintiff for the recovery of a portion of the property described in the complaint, or the value thereof, found to be \$287.50, and for the further sum of \$287.50 (being double damages) and for costs. This appeal is from the judgment and order denying defendants' motion for a new trial.

Among the articles which the complaint charges the defendants with having taken was a lot of tools. Deceased is alleged to have been the owner of said tools. Plaintiff intro-

duced evidence tending to show that deceased was in possession of said tools up to the time of his death. The witness Franks testified in cross-examination that deceased, while in possession of the tools, told him that the tools belonged to deceased.

The defendant Mary E. Newhall is the mother of deceased. She testified that the tools belonged to her, and that deceased was employed by her as foreman in her orchard; that he kept most of the tools "at the dryer and engines at his house" because it was more convenient for him for them to be there.

It is thus apparent that one of the important issues at the trial was as to the title of these tools. Defendants attempted to prove by the witnesses Geer and Stoddard declarations made by deceased to them to the effect that the tools belonged to his mother and that he was keeping them in his basement because it was more convenient. Several questions were asked for the purpose of eliciting testimony as to what deceased stated to the witnesses as to the ownership of the tools. The court sustained the plaintiff's objections to each of such questions, and the rulings are now complained of as erroneous.

The declarations were declarations by deceased against his interest, and the evidence was admissible. The courts hold such declarations admissible because of the extreme improbability of their falsehood. The regard which men pay to their own interests is deemed a sufficient security that any statement or declaration against interest should be received. The admission of such evidence is subject to the objection that it is easily fabricated, and the party who is alleged to have made such statement is beyond the reach of the process of the court, and hence cannot contradict it; but this objection goes to the weight of the evidence, and not to its admissibility. The testimony as to such declarations should be carefully scrutinized in view of all the surrounding circumstances and the motives or interest of the witness. If in the light of all the circumstances, and the credibility of the witnesses, the judge or jury believe that such declaration was made, they are to consider it as any other fact in the case. Section 1853 of the Code of Civil Procedure provides: "The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

The plaintiff, in her capacity as administratrix, is the successor in interest of her deceased husband. It was said by Cockburn, C. J., in *Regina v. Overseers of Birmingham*, 1 Best & Smith (Q. B.) 768: "Now, it has been held over and over again, in the analogous case of declarations against pecuniary interest, that the declaration of the deceased person may be received, not only to prove so much contained in it as is adverse to his pecuniary interest, but to prove collateral facts stated in it; at all events, so far as it relates to facts which are not foreign to the declaration, and may be taken to have formed a substantial part of it."

In *Peace v. Jenkins*, 10 Ired. (32 N. C.) 356, the supreme court of North Carolina held that declarations of a deceased person in regard to his indebtedness were competent in an action to recover personal property where the consideration of the bill of sale was attacked. The court said: "John T. Peace was dead, and his declarations were relevant to the very matter in dispute, to wit, his indebtedness to Josiah Peace, and upon a question of fraud and against his interest. Its aptness to prove that fact of indebtedness was to be considered of by the jury in deciding on its weight, from the time and circumstances under which it was made."

(See, further, 1 Greenleaf on Evidence, sec. 147 and notes; Chamberlayne's Best on Evidence, secs. 500-503, and American notes; 9 Am. & Eng. Ency. of Law, 2d ed., p. 8, and notes.)

It is not necessary to decide the question as to whether or not the complaint and findings support the judgment for double damages. As the case must be retried, we will presume that the court will see that the findings are supported by the pleadings and the evidence.

The judgment and order are reversed.

Hall, J., and Harrison, P. J., concurred.

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[No. 17. Third Appellate District.—June 3, 1905.]

W. H. LAMBERT, Appellant, v. EMMA LAMBERT, Respondent.

DIVORCE—DIVISION OF COMMUNITY PROPERTY—ADMISSIONS OF PLEADINGS—INCONSISTENT FINDINGS DISREGARDED.—Where the complaint of a husband, in an action for divorce on the ground of desertion, alleged that property described in the complaint was community property, and the answer expressly admitted that allegation, the fact admitted by the pleadings must be treated as found, and the finding of any probative facts inconsistent therewith must be disregarded; and the court, upon granting the decree, was authorized to divide the property, as community property, equally between the parties.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Clark & Clark, for Appellant.

George A. Lamont, for Respondent.

McLAUGHLIN, J.—The appellant sued for and was granted a divorce from respondent on the ground of desertion. In paragraph fourteen of his complaint it was alleged: "That there is community property belonging to plaintiff and defendant, 160 acres of hill land, and some stock and farming implements." This averment was not denied in the answer. On the contrary, its truth was expressly admitted. This admission, manifestly, made a finding unnecessary, but the lower court, in the finding of facts, recited that this particular parcel of hill land was purchased by and conveyed to plaintiff before his marriage with defendant. That about eight hundred dollars of the purchase money was borrowed by plaintiff from defendant before marriage, the plaintiff giving to defendant his promissory note for said sum, which note has not been paid. That eleven hundred and fifty dollars of the purchase price paid was money received from the sale of certain water-rights appurtenant to said land. That the remainder of the purchase price was paid from

money earned by the husband and wife after marriage. The conclusions of law contained a recital that this parcel of land "is the community property of plaintiff and defendant," and in the decree this land is so treated, and is equally divided between the parties. From this portion of the decree plaintiff appeals, on the ground that it is not supported by the findings of fact. He contends that, under the findings, the land mentioned was his separate property, and that, as the decree awards him a divorce upon the ground of respondent's desertion, the court had no power to divide such separate property equally between the parties. (Citing Civ. Code, sec. 146.)

The solution of the problem thus presented depends in a great measure upon the legal effect of the unnecessary finding of probative facts above mentioned. That such finding was unnecessary is established by many authorities. (*First National Bank v. Maxwell*, 123 Cal. 366, [69 Am. St. Rep. 64, 55 Pac. 980]; *Faulkner v. Rondoni*, 104 Cal. 143, [37 Pac. 883]; *Gregory v. Gregory*, 102 Cal. 52, [36 Pac. 364].) That it is a finding of probative facts is so plain that no citation of authorities seems necessary. "Facts admitted by the pleadings should be treated as 'found.' If the court finds adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings." (*In re Doyle*, 73 Cal. 570, [15 Pac. 125]; *Ortega v. Cordero*, 88 Cal. 226, [26 Pac. 81].) In the latter case it was said: "Any finding adverse to the admitted facts drops from the record," and it has been held time and again that findings contrary to the facts admitted by the answer must be disregarded. (*Bradbury v. Cronise*, 46 Cal. 289; *Burnett v. Stearns*, 33 Cal. 474; *Rudel v. Los Angeles County*, 118 Cal. 287, [50 Pac. 400].) The reason underlying this rule is obvious. Courts may decide where there is a difference, but they cannot make differences where none exist. If a finding of an ultimate fact, contrary to admissions in the pleadings "drops from the record," how much stronger is the reason why a finding of mere probative or evidentiary facts must fall before such admissions. It needs but the statement of the proposition to show that evidence, no matter how conclusive, must be idle as against an express admission in a pleading. And it needs as little reflection to

convince that a finding of evidentiary facts can be no more potent in this regard than the evidence on which it rests. Waiving the proposition that the recital as to the *status* of this property in the conclusions of law might be viewed as a finding of ultimate fact, nullifying the finding of probative facts, and resting on the admissions, it is clear that under the pleadings the conclusion was the only one the court could reach. Therefore, the decree, resting upon the admissions in the answer "as facts found," is fully supported. The judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 22. Third Appellate District.—June 3, 1905.]

FRED MICHAELSON, Appellant, v. FRANK W. FISH,
Respondent.

APPEAL FROM JUDGMENT—EXPIRATION OF TIME—DISMISSAL.—An appeal from a judgment taken more than six months after its entry must be dismissed.

NEW TRIAL—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—AGREED STATEMENT—ABSENCE OF OBJECTION.—Where the specifications of insufficiency of the evidence were made in an agreed statement substantially embodying the testimony, and plainly pointed to the particular defect in the proof, and no objection was made thereto, though the court evidently passed upon the motion with the agreed statement before it, the specifications must be deemed sufficient.

LIENS FOR UNPAID LABOR ON PERSONAL PROPERTY—BAILEMENT—EXCLUSIVE POSSESSION ESSENTIAL.—A lien for unpaid labor bestowed on personal property exists only in favor of a bailee for hire who has an independent and exclusive possession of the property, personally or by agent, before and during the service required for the particular purpose of making, repairing, altering, improving, or protecting the article upon which he claims a lien.

Id.—MASTER AND SERVANT—POSSESSION OF EMPLOYER—MANUFACTURE OF BRANDY—STORAGE WITH EMPLOYEE—ABSENCE OF LIEN FOR WAGES.—Where the relation of master and servant exists, the possession of the servant, during the term of his employment, is the possession of his employer, and he can have no lien on a manufactured article which is in part the product of his labor. One employed as general manager in a distillery has no lien on the manufactured brandy in part of the product of his labor, and the subsequent storage of the manufactured brandy by the employer,

with the consent of the employee, in the cellar of the latter, does not authorize him to retain possession thereof against the employer until his wages are paid.

APPEAL from a judgment of the Superior Court of Shasta County and from an order denying a new trial. Edward Sweeney, Judge.

The facts are stated in the opinion of the court.

Watson & Bush, for Appellant.

D. G. Reid, for Respondent.

McLAUGHLIN, J.—This action was brought by plaintiff to recover possession of eleven casks of brandy, with damages for withholding possession of the same. The defendant, answering the complaint, denied that plaintiff owned, or was entitled to the possession of the brandy, or had at any time demanded possession of the same. As a special defense, and as ground for affirmative relief, he alleged: That he was employed by one Annie Kline Rickert as a distiller to make and manufacture brandy, at an agreed wage of seventy-five dollars per month; that he was to receive one hundred and twenty-five dollars for certain fruit furnished by him to said employer; that his employer was using plaintiff's distillery in making said brandy, under permission from plaintiff; that he worked under said employment eight months, and that no part of his said wages, or of the money due for said fruit, had been paid; that he was in possession of said brandy until it was wrongfully taken from him under a writ of replevin; that he was entitled to retain possession of the same until he was paid for his labor in making it. The prayer was, that he be adjudged entitled to the possession of the brandy, and, in case it could not be returned, to its value.

The findings recite that the plaintiff is the owner of the brandy, and that he had demanded and been refused possession of two casks thereof. The other facts were found substantially as set forth in the answer, except as to the amount due for labor and services, which was fixed at two hundred and twenty-five dollars. It is further found: "That before giving up possession of said brandy he [defendant] was entitled to be paid for his labor in making the same, to the

extent of \$225.00, which said amount *was a lien upon said brandy for the labor of defendant in making the same.*" The conclusions of law contained a recital of like tenor, and, further, that defendant was entitled to possession of the brandy. Judgment was entered accordingly, and from this judgment and an order denying his motion for a new trial plaintiff appeals.

The appeal from the judgment was taken more than six months after the judgment was made and entered, and it must therefore be dismissed. (Code Civ. Proc., sec. 939, subd. 1; *Henry v. Merqure*, 111 Cal. 1, [43 Pac. 387.])

The motion for a new trial was based upon an agreed statement of the case. It contains no assignments of error, save four specifications of particulars, in which the evidence is insufficient to sustain the decision of the court. These specifications are assailed as being too general and uncertain. We do not think the court or opposing counsel could have had any doubt as to what evidence should be put into the statement, for the specifications plainly point to the particular defect in the proof. No objection appears to have been made that the specifications were insufficient, though the court evidently passed upon the motion with the agreed statement before it. The testimony appears to be substantially embodied therein. Under the liberal rule recently declared by the supreme court the specifications are entirely sufficient. (*Jones v. Goldtree Brothers Co.*, 142 Cal. 383, [77 Pac. 939] ; *American Type etc. Co. v. Packer*, 130 Cal. 462, [62 Pac. 744.])

The principal question presented by such specifications is this, Does the ordinary relation of master and servant alone entitle the servant to a lien on a manufactured article which is in part the product of his labor? According to the testimony of defendant, he was employed to work in this distillery as a distiller and general manager. He had charge of the distill and of the grape-pickers, and worked at anything and everything about the premises. Aside from the grape-pickers, at least three men, Benton, Jewell, and Rickert, assisted in making the brandy. After being manufactured, the brandy was stored in his cellar, with his consent, and by direction of Mrs. Rickert. All this was during his employment as above mentioned. That he had no special possession of the brandy before or during the manufacture thereof, for any

purpose or in any sense, is clear. His possession during the term of his employment was the possession of his employer, under every rule governing the relation of master and servant. (*Ledley v. Hays*, 1 Cal. 161; *Goodwin v. Carr*, 8 Cal. 615; *People v. Perini*, 94 Cal. 575, [29 Pac. 1027].) Our statutory provisions are but re-enactments or extensions of the common law relating to liens of this character. Under both, a person who makes, alters, or repairs any article of personal property, or who by labor or skill improves such article, will have a special lien thereon, and may retain possession until his charges are paid. (Jones on Liens, sec. 731 et seq.; Civ. Code, secs. 3051, 3052.) But this lien exists only "in favor of a *bailee for hire*, who takes property, in the way of his trade and occupation, and by his labor and skill imparts additional value to it." (Jones on Liens, sec. 731.) In other words, if personal property is delivered to a person, either for the purpose of having another article made from it, as gold for a ring, leather for a harness, or lumber for a desk, or for the purpose of having it altered, repaired, or improved, the person having special possession for any of the purposes mentioned, and who performs the service required of him, will have a special lien on the article for his charges, as long as he retains possession of the same. But this is far from saying that any employee will have a lien on any article manufactured during the course of his employment. Such a doctrine would not only result in a babel of voices, each claiming a lien on the product of factory, mill, and forge, but would paralyze every industry where many perform their part in manufacturing the infinite variety of articles now upon our markets. It is indispensable to this character of lien that the person asserting it should have an independent and exclusive possession of the property. (*Grinnell v. Cook*, 3 Hill (N. Y.), 485, [38 Am. Dec. 663]; *Hollingsworth v. Dow*, 19 Pick. 228.) Nay, more; he must have such possession personally, or by an agent, before and during the service required, and for the particular purpose of rendering some service in making, repairing, altering, improving, or mayhap protecting the article upon which he claims a lien. (*McDearmid v. Foster*, 14 Or. 417, [12 Pac. 816, 817]; *Wens v. McBride*, 20 Colo. 195, [36 Pac. 1105]; Jones on Liens, sec. 731 et seq.) Applying these principles to the case at bar, we are forced to the conclu-

sion that not one element essential to this character of lien existed. Viewing the evidence in the light most favorable to respondent's contention,—going even farther, and conceding that he was employed as a distiller and did nothing else,—still his lien must fall. Whether his position was humble or exalted, his duties special or general, he was still a servant. His rights and duties were both governed by the law pertaining to the relation of master and servant. He could not be a bailee in any sense, much less for hire, for his possession in any event would be the possession of his employer. He could not and did not have that *independent* and *exclusive* possession of the brandy indispensable to the lien claimed. Neither before nor during the manufacture did he have possession of the brandy, or the fruit from which it was made, any more than Jewell, or Benton, or the grape-pickers, his co-workers, had. None of these co-workers had possession, and neither did he. The possession was in the employer, whose servants they all were, during the entire process of making the brandy. It may be claimed that he had obtained possession of the brandy *after* it was made. Waiving the evidence which shows conclusively that the liquor was in the actual or constructive possession of the employer all the time, such possession could not avail him here, for we have seen that such a possession is not an element in this class of liens. If an employee in a manufacturing establishment could obtain a lien by simply securing possession of a keg of pickles, a box of crackers, or a bolt of cloth, according to the nature of his work, resulting chaos would compel a repeal of the law under which such lien obtained. And then respondent's service was not *special*, as being confined to the distill or the manufacture of this brandy. Sour wine was made, and he himself says he picked fruit, looked after the men, kept the books, did some grubbing and carpenter-work, papered the house, hauled stuff to Redding, and did "most everything while he was there," all during the term of his employment. Neither was the brandy the sole product of *his* service. *He* informs us that at least three men, besides the grape-pickers, assisted in making the brandy. Others employed with him, by the same master, under separate and distinct contracts of employment, contributed *their* labor, and even the plaintiff furnished his fruit. Under these circumstances there could be no lien. It might as well be claimed

that the product of the loom is subject to the lien of any of the many persons whose fingers deftly contributed to its texture, color, or finish. As was well said by our supreme court, "We know of no principle of law which authorizes an employee to take or retain property of his employer until his wages have been paid." (*Ex parte Corran* (Cal.), 41 Pac. 454). That no lien exists in favor of a person situated as respondent has been the uniform holding wherever the question has arisen. (*McIntyre v. Carver*, 2 Watts & S. 392, [37 Am. Dec. 519]; *Fitzgerald v. Elliott*, 162 Pa. St. 118, [42 Am. St. Rep. 812, 29 Atl. 346]; *Mechem on Agency*, sec. 676; *Lawrence v. Phy*, 27 Or. 506, [41 Pac. 673].)

The court having found that appellant was the owner of the brandy, it followed that he was entitled to possession, unless respondent had some legal right to withhold such possession. The materiality of the findings or decision that respondent had a lien, and was entitled to possession until his wages were paid, is therefore apparent. The evidence is insufficient to justify or sustain the last-mentioned findings.

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is reversed and a new trial granted.

Chipman, P. J., and Buckles, J., concurred.

[No. 23. Third Appellate District.—June 3, 1905.]

J. M. BURNS, Respondent, v. JACOB SCHOENFELD,
DAVID ADLER, and JEFFERSON JAMES, Appel-
lants.

APPEAL FROM NEW TRIAL ORDER—REVIEW—FINDINGS.—Upon appeal from an order denying a new trial only, the sufficiency of the findings to support the judgment cannot be considered, and the only inquiry as to the findings is whether they are supported by the evidence.

MINING—EXCAVATION BY SERVANT FOR MILL-SITE—EXTRACTION OF GOLD—TITLE OF SERVANT—RECOVERY OF VALUE.—Where it appears that a servant employed by defendants solely to excavate land, appropriated as non-mineral, for a mill-site, and that in the course of his excavation for the mill-site he discovered gold, which was mined

by him and reduced to his possession as his own, he is entitled thereto as the first taker on public lands, and may recover the value thereof from the defendants, who forcibly took possession thereof from him.

12.—FINDING OF TITLE SUPPORTED BY EVIDENCE—CONFLICT—CONCEALED INTENTION OF DEFENDANTS.—A finding in favor of the plaintiff's title to the gold mined is sufficiently supported where evidence of the intention of the defendants to avail themselves of any mineral found on the mill-site was concealed from the servants employed to excavate the land solely for a mill-site, and is in conflict with the physical facts and circumstances surrounding the work, and the testimony for defendants upon a former trial which tend to support the finding.

APPEAL from an order of the Superior Court of Tulumne County denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, for Appellants.

J. C. Webster, and E. W. Holland, for Respondent.

CHIPMAN, P. J.—Action to recover from defendants the value of certain gold and gold-bearing rock of which plaintiff alleges ownership and possession, and that defendants wrongfully and against his will took, carried away, and converted to their own use. The cause was tried by the court without a jury, and plaintiff had judgment for six hundred dollars, with interest from February 23, 1899, and costs.

Defendants moved for a new trial, which was denied, and they appeal from the order. There is no appeal from the judgment, and we therefore cannot consider the sufficiency of the findings to support the judgment, and can only inquire whether the findings are supported by the evidence. (*Bauer v. Fay*, 128 Cal. 523, [61 Pac. 90].)

It appears from the findings: That defendants are owners of a mine of which one Bleck (originally made a defendant) was general manager; that near said property, and on public lands of the United States, defendants selected a site for a quartz-mill and were engaged in grading said site for the purpose of erecting a quartz-mill thereon, and on February 23, 1899, employed plaintiff as a laborer to do grading for

them for the purpose of erecting said quartz-mill, which said grading was being done on the public land of the United States, on which defendants had made no location with a view of acquiring title under the laws of the United States: "That on said day plaintiff discovered, near the northwest corner of the excavation made in the hill, and within the outer limits of said excavation, a pocket of gold of the value of \$600.00 and dug the same out and took possession thereof with the intent of appropriating it to himself; that one Clark [originally one of defendants] took said gold from plaintiff's possession, without his consent and against his will, and delivered it to said Bleck, who delivered it to defendants, who appropriated it to their own use; that plaintiff was never employed or instructed by defendants or any of them to do mining or prospecting for gold, and that his sole employment by defendants on said 23d day of February and the work he was then engaged in was that of a laborer to do grading for the purpose of erecting a quartz-mill on the public lands as above stated"; and that defendants' occupation of said grade was for the purpose of erecting a quartz-mill, and not otherwise, and the object of the excavation was to construct a quartz-mill, and for no other object or purpose; that at the times mentioned said Clark was superintending said grading for said purposes, and said Bleck was general manager of defendants' business, and neither said Clark nor said Bleck has any interest in said gold so converted.

This is the second appeal of the case. (*Burns v. Clark*, 133 Cal. 634, [85 Am. St. Rep. 233, 66 Pac. 12].) Substantially every principle of law now involved was decided adversely to defendants in the first appeal. Assuming that the evidence showed, as the findings on sufficient evidence now show, that plaintiff on discovery of the gold reduced it to possession with intent to appropriate it to himself, and that it was taken from him by Clark, the agent of defendants, it was held that mere occupancy of a thing, as against all except the state and the owner, is a sufficient title (Civ. Code, sec. 1006); that where things are found that have no owner they belong, as in a state of nature, to the first occupant or fortunate finder. (2 Blackstone's Commentaries, 402; 1 Blackstone's Commentaries, 295; 2 Kent's Commentaries, 356); that in the case of valuable mineral deposits the title of the first taker is confirmed

by express statutory grant (U. S. Rev. Stats., sec. 2319 (U. S. Comp. Stats. [1901], p. 1424); *Forbes v. Gracey*, 94 U. S. 762); that defendants' claim to the gold by virtue of their occupancy (Civ. Code, sec. 1006) in point of law could not be maintained, because they could acquire no title to mineral land by occupancy except for the purpose of mining or extracting the minerals (U. S. Rev. Stats., sec. 2319 (U. S. Comp. Stats. [1901], p. 1424); *McClintock v. Bryden*, 5 Cal. 97, [63 Am. Dec. 87, and note]; Lindley on Mines, secs. 216 et seq., 219; and in point of fact the evidence was, that defendants did not enter upon the land for any such purpose, but to establish a mill-site, which was permissible only on non-mineral land (U. S. Rev. Stats., sec. 2337 (U. S. Comp. Stats. [1901], p. 1436); Lindley on Mines, secs. 519 et seq.): that defendants did not acquire any title to the gold by virtue of plaintiff's employment under the provisions of section 1985 of the Civil Code, because defendants were engaged in excavation, not for minerals, but for the purpose of removing and throwing away the matter excavated, and the gold found by plaintiff was property without owner or intending owner, and therefore subject to his right of appropriation by occupancy, and the case comes within the same principle as that in *Bowen v. Sullivan*, 62 Ind. 281, [30 Am. Rep. 172, and note], where the property was found by the employee in the course of her employment; and in the similar cases of *Hamaker v. Blanchard*, 90 Pa. St. 377, [35 Am. Rep. 664], and *Durfee v. Jones*, 11 R. I. 588, [23 Am. Rep. 528].

In the course of the opinion, however, it was said: "Had the object, or one of the objects, of the excavation been to obtain the gold, any gold found by an employee would doubtless belong to his employers." Appellants contend that the uncontradicted testimony submitted at the second trial established the fact that they did enter upon the land, or at least, before the pocket of gold was found, did pursue the excavation work with the intent to appropriate any gold that might be discovered. The court found against defendants upon this point and the case may be said to hinge upon this finding. There is evidence tending to show that after the excavation work had progressed somewhat some stringers were brought to Bleck's attention containing gold and that Bleck was told by one of the owners "to watch it and appropriate it and look

out for it; look out for it and take the gold," and Bleck testified that he told Clark "to watch those stringers closely, and if anything turned up to let him know; . . . I continued these men in their employment for the purpose of grading that floor down to its proper level and incidentally to uncover more of this ledge—that was the second purpose, the uncovering of this ledge." It is not claimed that he, or any one else, so informed the men who were at work there. His testimony was out of harmony with his testimony at the former trial, at which time he testified that the purpose of the excavation was to grade a mill-site, and did not then claim that defendants had any other purpose. The testimony taken at the former trial went into all the circumstances attending the work with much particularity, but no witness hinted at any intention on the part of defendants such as they now claim was incidentally their purpose. The trial judge had all the witnesses before him, and was in a better position to weed out the improbabilities from the evidence than we are. It was said in *Sarraille v. Calmon*, 142 Cal. 651, [76 Pac. 497]: "We cannot put ourselves in the shoes of the judge who had the witnesses before him; we cannot say to what extent he discovered what he thought were inherent improbabilities in the statements of witnesses, nor can we say how far witnesses by their manner of testifying may have given rise to doubts of their sincerity, or may have impressed the judge with their having given a wrong coloring to material facts." We do not think the claim of defendants that the evidence as to their intention in excavating the ground in question was absolutely without conflict is maintainable. True, no witness for plaintiff could or did testify to what was passing in defendants' minds. But there were physical facts and circumstances surrounding the work which did tend to dispute the concealed intent of defendants, conceding that they had any such intent.

We think that there is evidence sufficient to support the findings.

The order is affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 24. Third Appellate District.—June 2, 1905.]

J. F. GIBSON, Appellant, v. T. B. TWADDLE et al., Respondents.

ELECTION—CANVASS BY SUPERVISORS—NATURE OF POWERS—REJECTION OF UNAUTHENTICATED RETURNS—CERTIFICATE.—The board of supervisors, in canvassing the returns of election, have no judicial powers, and cannot hear or determine evidence. They are not authorized to canvass any returns not duly authenticated, and have no duty to permit an authentication to be made of unauthenticated returns of a precinct, and may reject the same and issue a certificate of election based upon such rejection, which is *prima facie* evidence of a right to the office.

ID.—CESSATION OF FUNCTIONS—REMEDY BY CONTEST—MANDAMUS NOT PERMISSIBLE.—Where the supervisors have issued the certificate of election and adjourned as board of canvassers, their functions have ceased; and there being an adequate and exclusive remedy by contest of the election, *mandamus* will not lie after such adjournment to compel the board of supervisors to permit the election officers of the rejected precinct to authenticate the returns, and to count the rejected returns.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Charles G. Lamberson, and H. B. McClure, for Appellant.

Hannah & Miller, Bradley & Farnsworth, and Maurice E. Power, for Respondents.

McLAUGHLIN, J.—The appellant and one Crowley were candidates for assessor of Tulare County at the general election held in 1902. The respondents are members of the board of supervisors of Tulare County, and as such, on November 10, 1902, met for the purpose of canvassing the election returns, pursuant to section 1278 et seq. of the Political Code. At that time the *returns from all the precincts in the county had been received*, and the board proceeded to canvass the same. When Liberty Precinct was reached, it was found that the tally-sheet had not been signed or attested by any of the members of the election board, as required by section 1260 of

the Political Code. The board of supervisors refused to canvass the returns or count the votes of that precinct, but canvassed the returns from all other precincts in the county. Finding, upon the completion of such canvass, that Crowley had received a majority of all the votes cast, they declared him elected, and directed that a certificate of election issue to him. Had the votes of Liberty Precinct been counted, appellant would have had three majority on the face of the returns. On November 11th, while the board of supervisors was still canvassing said returns, the election officers of Liberty Precinct appeared before them and asked permission to sign and attest the tally-sheet. This was after the returns from said precinct had been opened and passed. The board of canvassers refused to allow the election officers to sign or attest the tally-sheet, and proceeded with the canvass. On December 3, 1902, *after the canvass of said returns had been fully completed*, and after the result had been declared and the certificate of election had issued to Crowley, this action was brought. The appellant, in his petition, recited the above and other pertinent facts, and prayed that a writ of mandate might issue to the respondents, as a board of supervisors, commanding them to permit the election officers of Liberty Precinct "to sign said tally-list, and thereupon to canvass and count the returns of said election from said Liberty Precinct." To this petition respondents demurred, upon the grounds that no cause of action was stated and that petitioner had a plain, speedy, and adequate remedy in the ordinary course of the law. The demurrer was sustained, and from the judgment thereupon entered denying the writ this appeal was taken.

The writ of mandate will issue to a board of supervisors to compel the performance of an act which the law *especially enjoins* as a *duty* resulting from their office. And then only where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. (Code Civ. Proc., secs. 1085, 1086.) The returns referred to in section 1268 of the Political Code "are the sealed packages containing the register, lists, papers, and ballots," prescribed by sections 1261 and 1263 of the same code. In canvassing such returns the board has no authority "to consider anything but the returns before it." "It has no judicial powers. The duties of canvassers are

simply to add, and ascertain by calculation, the number of votes given for any office. They were not authorized to decide, in any other mode than by an examination of the returns made to them according to law. They are not required, or authorized to hear witnesses or weigh evidence. They have no power to canvass, as election returns, any papers not duly authenticated in the mode prescribed by law. An attempted canvass, in which the result declared was based on papers not thus authorized, may be treated as a nullity by the party injured." (*People v. Stewart*, 132 Cal. 285, [64 Pac. 285].) If the powers of a board of supervisors are thus limited, it is indeed difficult to conceive how it can be their *duty* to allow persons who voluntarily appear before them to add to, or subtract from, the "returns made to them according to law." If they can only act on papers "duly authenticated as required by law," they are certainly under no obligation to permit a *post factum* authentication. If they can only "add and ascertain by calculation, the number of votes given for any office, by an examination of the *returns made to them*," according to sections 1260 to 1264 inclusive of the Political Code, it is clear that they cannot be compelled by mandate to ascertain such facts in another way. (*Pacheco v. Beck*, 52 Cal. 7; *Carlson v. Burt*, 111 Cal. 131, [43 Pac. 583].) Therefore, the acts here sought to be compelled are not specially enjoined by law, nor are they duties resulting from the office of supervisor.

Turning to the other point, we are at a loss to see how a writ of mandate can be a panacea for appellant's legal ills, much less the only plain, speedy, and adequate remedy he can invoke. Boards of supervisors, in canvassing returns, must commence and conclude their labors, as required by sections 1278 to 1284 inclusive of the Political Code. When this has been done, their functions as a canvassing board cease, and we have found no law which even hints that they may reconvene for the purpose of recanvassing the returns, and annulling the certificate of election previously issued. We are positive that they cannot be compelled to do so by *mandamus*, and it is only in this way that appellant could be benefited by this proceeding. This special body, born of the law for a special purpose, had adjourned *sine die* before this action was commenced, and, unless it could be re-

vivified and *compelled to undo its work*, mandate would be futile. Appellant's adversary held a certificate which was *prima facie* evidence of his right to the office, and relief must be inadequate unless this certificate could be canceled. Crowley had been "declared elected," and section 1111 et seq. of the Code of Civil Procedure certainly provides a plain, speedy, and adequate remedy in such cases. In our opinion, these sections provide the *exclusive* remedy for setting aside or canceling the certificate of election issued as a result of the official canvass by the board of supervisors. (*Sweeny v. Adams*, 141 Cal. 560, [75 Pac. 182].) To hold otherwise must lead to incongruous results. If appellant could seek and procure a cancellation or amendment of the certificate of election through *mandamus*, then certainly any other citizen could invoke the remedy permitted under the sections last cited, and ask judgment according to the terms of section 1122 of the Code of Civil Procedure. It might frequently happen, if this was allowable, that the face of the returns would authorize such cancellation, while a count of the ballots would compel a very different result in the other proceeding. In that event there would be divergent judgments affecting the same office or right. This would be intolerable. The law will bear no such construction, and if it would, the law demands that it be given an interpretation which will avoid absurd results.

The judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

A petition to have this cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on July 25, 1905.

I Cal. App.—9

[No. 12. Second Appellate District.—June 5, 1905.]

**W. L. ARMANTAGE, Petitioner, v. SUPERIOR COURT OF
LOS ANGELES COUNTY, Respondent.**

CERTIORARI—JUDGMENT UPON APPEAL FROM JUSTICE'S COURT—QUESTIONS OF LAW AND FACT—TRIAL BY JUSTICE WITHOUT LEGAL NOTICE.—*Certiorari* will not lie to review a judgment of the superior court rendered after trial therein, upon an appeal from a justice's court taken upon questions of law and fact, notwithstanding the trial was had in the superior court, without the presence of the appellant, and without the notice required by section 850 of the Code of Civil Procedure.

ID.—JURISDICTION OF JUSTICE'S COURT NOT INVOLVED—ERROR IN SUPERIOR COURT NOT REVIEWABLE.—The jurisdiction of the justice's court is not involved in the petition for *certiorari* to review the judgment of the superior court, and conceding, without deciding, that it was error for the superior court to try the case upon appeal, its action in overruling an objection thereto was within its jurisdiction, which involves the power to decide wrong as well as right,

ID.—ORIGINAL JURISDICTION OF SUPERIOR COURT.—Where an appeal is taken from a justice's court on questions of fact or questions of law and fact, the superior court has original jurisdiction to try the case without a statement if there was any trial of issues in the justice's court, with or without jurisdiction.

PETITION for *Certiorari* to review a judgment of the Superior Court of Los Angeles County rendered upon appeal from a justice's court.

The facts are stated in the opinion of the court.

J. E. Light, for Petitioner.

J. D. Bethune, for Respondent.

GRAY, P. J.—This is an application for a writ of *certiorari*, otherwise called the writ of review.

The facts are, that E. B. Multer commenced an action in the justice's court against Armantage, the plaintiff herein. Summons was duly served on Armantage, who thereafter demurred to the complaint, and on said demurrer being overruled, answered. The case was thereafter set down for trial. The notice that the case had been set for trial was not served

like a summons, as is required by section 850 of the Code of Civil Procedure, but was served by mail only. Armantage did not appear at the time fixed for trial, and the justice at said time tried the case in the absence of Armantage and rendered judgment against him. Thereafter Armantage duly appealed to the defendant, the superior court, on questions of both law and fact. The case was set for trial in the superior court. The appellant appeared and objected to a trial, and asked that the judgment of the justice be reversed and the cause remanded to the justice's court. The superior court refused to make such order, but proceeded, against the objections and exceptions of the appellant, Armantage, to try the issues of fact, and rendered judgment against Armantage for two hundred and fifty dollars and costs.

It is contended that the superior court had no jurisdiction on the appeal to do anything in the case except reverse the judgment and order the case back to the justice's court in accordance with the demand of the appellant.

"When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court." (Code Civ. Proc., sec. 976.)

The above section is perfectly intelligible, and if it were to have a literal construction it would seem that the appeal having been taken on questions of both law and fact, the court in trying the case anew pursued the only course left open to it under the statute. But it is said that the supreme court has held that where no trial of the case has been had in the justice's court, it is the duty of the superior court to reverse the case for error of law and order the case back to the justice's court for further proceedings. Such seems to be the rule laid down by the supreme court, where the appeal was taken on both questions of law and fact. (*Myrick v. Superior Court*, 68 Cal. 98, [8 Pac. 648].) In that case, however, nothing in the shape of a trial had been had in the justice's court, and no question as to the proper office of the writ of *certiorari* is made or discussed.

The above-quoted section of the Code of Civil Procedure was adopted for the purpose of expediting litigation in justices' court. It was recognized that if the same procedure was to be followed on appeals to the superior court that is

pursued on appeals to the supreme court, it would follow that, skillful advantage being taken of such procedure, it might be made practically impossible in some cases to secure a final judgment of any value in the justice's court. And so they gave the superior court by this statute what may be termed an original jurisdiction to try the case, where the appeal was taken on questions of fact, or on questions both of law and fact. (*Bullard v. McArdle*, 98 Cal. 355, [35 Am. St. Rep. 176, 33 Pac. 193]; *Maxon v. Superior Court*, 124 Cal. 468, [57 Pac. 379].) This wise purpose of the statute must be disregarded if the judgment of the superior court is annulled, as prayed for in the petition herein. The justice's court no doubt tried the case without any jurisdiction so to do. (*Elder v. Justice's Court*, 136 Cal. 364, [68 Pac. 1022].) But how do we know that if the case is sent back to him he will not try it again without having acquired jurisdiction? If it is sent back to him a second and a third time, or any number of times, he may continue to try it without having obtained jurisdiction so to do. It is said that no trial has been had in the justice's court because the trial was a nullity. Let this be granted, and yet the delay is the same, and the object of the statute is as effectively defeated when the case is sent back after a trial *without* jurisdiction as it is when it is sent back after a trial had *with* jurisdiction.

Moreover, it is not the question of the jurisdiction of the *justice court* that is involved in this case. The petition here is aimed at the judgment of the superior court rendered on the appeal, and the question is, Was that judgment rendered without jurisdiction? The petitioner appealed the case, and by virtue thereof gave the superior court jurisdiction of the cause, as well as of the persons of all the parties to the suit. It was not required that notice of the trial should be served "the same as a summons" before trial could be had in the superior court. All the *jurisdictional* steps leading to a trial of the case *de novo* in the superior court had been taken when the appeal on questions of both law and fact had been perfected (unless, possibly, it might be held that the five days' notice of the trial required by section 594 of the Code of Civil Procedure was jurisdictional, but it is not here contended or shown that such notice was not given, and it will be presumed that it was given). The very first thing that the court was

called upon to do in the exercise of the jurisdiction thus conferred upon it by the appeal was to construe said section 976 of the Code of Civil Procedure and determine whether he would try the case or send it back. Let it be conceded, without deciding the question, that, under the statute as heretofore construed by the supreme court, the superior court should have sustained the objection of the appellant to trying the case and should have granted his request to reverse the judgment of the justice and send the case back; yet the refusal was only error. If these objections had not been made, or if the appellant had failed entirely to appear after his appeal was perfected, and a trial, after the five days' notice, had been had in his absence in the superior court, there could have been no question as to the validity of the judgment following such trial. The court had the same *jurisdiction* to overrule appellant's objections that it had to sustain them, or to proceed to judgment in the appellant's absence. Jurisdiction is the power to decide—wrong, as well as right.

The fact is, the petitioner here, having no appeal from the decision of the superior court, is endeavoring to substitute *certiorari* for an appeal, and thereby have reviewed the objections made and the exceptions taken in the superior court that he is prohibited from having reviewed upon appeal. This he may not do. It has been held in every late case in our supreme court, where the question has been squarely raised, that *certiorari* goes only to the jurisdiction or power of the court to act, and can never be substituted for an appeal to review the mere errors of a judicial tribunal. (*Borchard v. Supervisors*, 144 Cal. 10, [77 Pac. 708]; *Valentine v. Police Court*, 141 Cal. 615, [75 Pac. 336]; *Wittman v. Police Court*, 145 Cal. 474, [78 Pac. 1052]; Code Civ. Proc., sec. 1068.)

The petition for the writ is therefore denied.

Allen, J., concurred.

SMITH, J., concurring.—I concur, with some hesitation, in the conclusion reached by the majority of the court. By the provisions of the Code of Civil Procedure bearing upon the subject, the party appealing from the judgment of the justice's court is allowed thirty days after the rendition of judgment to perfect his appeal (sec. 974). In the following

section two methods of appeal are provided, namely: 1. Within ten days on a statement of the case, on questions of law alone; 2. Within thirty days without a statement, on questions of fact or of law and fact. In the latter case, the proceeding is not, properly speaking, an appeal; nor is the judgment said to be appealed from *reversed*, as it would be—if found erroneous—on appeal. But the judgment is vacated by the mere act of the so-called appellant, in the exercise of his option, and the cause transferred for all purposes to the superior court; which thereupon acquires original, or quasi-original, jurisdiction of the case. (*Bullard v. McArdle*, 98 Cal. 358, [35 Am. St. Rep. 176, 33 Pac. 193]; *Holbrook v. Superior Court*, 106 Cal. 593, [39 Pac. 936].) The plain meaning of these provisions, therefore, seems to be, that the losing party shall have the option either of appealing from the judgment (in the ordinary sense of the term, appeal) on questions of law only, or of vacating the judgment, and transferring the case for trial of all issues, whether of law or fact, to the superior court; and that the latter course is equally open to him, whether the case has been disposed of in the justice's court, either before or after a trial of the issues of fact in that court. Nor is the language of the act inapplicable to cases where there has been no trial of issues of fact, or even where no issue of fact has been joined. For the expression "questions of fact" may be taken to refer to the issues of fact in the case, generally,—that is to say, not only to the issues actually made in the justice's court, but also to those thereafter arising either in that or the superior court. Otherwise—as was once supposed—the pleadings could not be amended in the superior court. (*Kitts v. Superior Court*, 62 Cal. 203; *Ketchum v. Superior Court*, 65 Cal. 494, [4 Pac. 492]; *Baker v. Southern Cal. Ry. Co.*, 114 Cal. 506, [46 Pac. 604].) Indeed, "there is . . . some reason for the suggestion that the legislature intended this to be the result of all appeals, and that on an appeal on questions of law alone the cause should be considered as in the superior court for all purposes, and if the trial of issues of fact should be found necessary, it should be had in the superior court." (*Mason v. Superior Court*, 124 Cal. 470, [57 Pac. 379].) But, however this may be, it seems at least to be clear that where the appeal is taken "on questions of fact" or "on questions both of law and fact," such

was the effect intended. (*Bullard v. McArdle*, 98 Cal. 358, [35 Am. St. Rep. 176, 33 Pac. 193]. See, also, *Sanborn v. Contra Costa County*, 60 Cal. 426-427; *Curtis v. Superior Court*, 63 Cal. 436.) Nor is there anything inconsistent with this view in the provision of section 976 of the Code of Civil Procedure, that in such case "the action must be tried *anew* in the superior court." For the expression here used will apply equally to trials of issues of law as of fact. (Code Civ. Proc., secs. 591, 592.)

It is, indeed, difficult to reconcile this conclusion with the decisions holding that on appeal from a judgment in a justice's court on questions of fact, the superior court has jurisdiction only to "retry the issues tried in the court below"; or, as otherwise expressed, that "the issues of *fact* cannot be tried *anew* in the superior court until after they have been tried in the justice's court." (*People v. El Dorado County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661; *Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 471; *Myrick v. Superior Court*, 68 Cal. 98, [8 Pac. 648]; *Fabretti v. Superior Court*, 77 Cal. 305, [19 Pac. 481].) But leaving out of view the objection that this reasoning seems to come within the application of the maxim *Qui haeret in litera, haeret in cortice*, these cases have, in effect, been overruled by the cases cited *supra*, holding that amendments of the pleadings may be allowed in the superior court—thus creating new issues that have never been tried, and which, therefore, according to the reasoning of these cases, cannot be tried *anew*. The leading case has also been overruled on every point involved in it. That case was the dismissal of an appeal from a judgment by default in the justice's court "on questions both of law and fact," and *mandamus* to compel a trial in the superior court, which was denied on the grounds that the appeal on the questions of law was unavailable, because there was no statement and the appeal "on questions of fact" equally so, because there were no issues of fact in the justice's court, and therefore "no questions of fact to try." (*Ketchum v. Superior Court*, 65 Cal. 495, [4 Pac. 492].) But the latter point was in effect overruled by the case cited, and other cases cited *supra*, in holding that the pleadings might be amended in the superior court; and the former expressly by the case of *Southern Pa-*

cific R. R. Co. v. Superior Court, 59 Cal. 474. And in the case of *Lewis v. Barclay*, 35 Cal. 214, which was similar, it was held that the dismissal of the appeal was an exercise of jurisdiction, and could not be reviewed "by *mandamus* nor, indeed, by any other means"; and it was said, in effect, that in the principal case this point had not been made, and hence the case could not be regarded as authority upon the question as to the remedy, or, in other words, upon the question of jurisdiction. The case was, therefore, not authority for the decision in *Bickey v. Superior Court*, 59 Cal. 661, and *Myrick v. Superior Court*, 68 Cal. 98, [8 Pac. 648], or for what is said in *Fabretti v. Superior Court*, 77 Cal. 305, [19 Pac. 481], and in *Maxson v. Superior Court*, 124 Cal. 471, [57 Pac. 379]. The remaining case (*Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 474) is based upon the special ground that no jurisdiction had been obtained of the person of the defendant.

It is also to be observed that neither in the principal case nor in the cases affirming it was the question considered whether the action complained of was mere error or in excess of jurisdiction; though the former view seems to be affirmed in *Lewis v. Barclay*, 35 Cal. 214, and in *Holbrook v. Superior Court*, 106 Cal. 593, [39 Pac. 936].

A petition to have this cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on August 4, 1905.

[No. 12. Third Appellate District.—June 6, 1905.]

W. W. GREENE, Appellant, v. G. G. MURDOCK, Respondent.

SLANDER—WORDS NOT ACTIONABLE PER SE—OPENING LETTER ADDRESSED TO DEFENDANT—CRIME NOT IMPUTED.—A charge by the defendant that the plaintiff had opened a letter addressed to the defendant from his attorney, without stating that it was done without authority and willfully, is not actionable *per se* as imputing a crime.

ID.—COMPLAINT NOT PROVED—NONSUIT.—Where the complaint alleged that the words spoken were understood by those who heard them as imputing a crime, and the answer admitted the words spoken and

alleged their truth, but denied all the other allegations of the complaint, and the plaintiff rested with mere proof of the defendant's property, a nonsuit should have been granted.

Id.—IMMATERIAL ERROR IN INSTRUCTIONS.—Where, under the pleadings and the evidence, the plaintiff was not entitled to a verdict, he is not prejudiced by erroneous instructions to the jury.

APPEAL from a judgment of the Superior Court of Lake County and from an order granting a new trial. R. W. Crump, Judge.

The facts are stated in the opinion of the court.

T. J. Sheridan, and Thomas B. Bond, for Appellant.

Crawford & Crawford, and M. S. Sayre, for Respondent.

BUCKLES, J.—This was an action for slander. The case was tried with a jury. At the trial the plaintiff called and examined the defendant as to his property and rested. Defendant moved a nonsuit which was denied. The defendant then produced witnesses who gave testimony tending to prove the defense of justification pleaded in his answer, and testimony also in mitigation of damages, and to disprove malice on the part of defendant in uttering the words complained of, and rested. Plaintiff in rebuttal then produced witnesses who gave testimony tending to disprove the defense of justification pleaded in the answer. The case was then submitted to the jury, and the jury found a verdict for the defendant, and the court rendered judgment for the defendant for his costs, —to wit, \$268.81. A motion was made for a new trial, which motion was denied.

Appeal is taken from the judgment and the order denying a new trial. Briefly, the complaint charges that defendant accused plaintiff of opening a sealed letter from Richard Bayne, his attorney, to his damage in the sum of five thousand dollars. The charge is as follows to wit:—

“The plaintiff is informed and believes that on or about the 15th day of December, A. D. 1900, at the residence of the defendant aforesaid, in the county of Lake, the defendant, in a certain discourse which he then and there had, addressing the said Frank Greene, and in the presence and hearing of the said Frank A. Greene, and the said Andrew Jones and the

said Zeno Jones, falsely, slanderously and maliciously spoke, published and uttered of and concerning the plaintiff the false, slanderous and malicious words following: 'Your father (meaning the plaintiff) damaged me hundreds of dollars, your father (meaning plaintiff) opened a letter of mine of great importance to me from my attorney, Mr. Bayne of San Francisco (meaning the said Richard Bayne, Esq.), and the defendant meant by such words, and desired and intended to be understood to mean by them and was in fact by the said Frank A. Greene, and Andrew Jones and Zeno Jones, understood to mean by them that this plaintiff willfully and unlawfully opened and read a sealed letter not addressed to himself without being authorized so to do either by the writer of such a letter or by the person to whom it was addressed, and he did so with the design to pry into the business and secrets of defendant and did secrete, embezzle and destroy the said letter.'

The answer admits the defendant uttered the words complained of, "but denies that said words or any of them were false, slanderous or malicious or that they or any of them were falsely, slanderously or maliciously spoken, published or uttered, but avers upon his information and belief that said words were and are true." The answer also denied all other material allegations of the complaint. The appellant contends that the words spoken were actionable *per se*, or at least made so by the admissions in the answer. In this state the law does not make the mere opening and reading of a sealed letter of another a crime (See Pen. Code, sec. 618.) It must have been willfully done; and to simply say, "You opened and read a letter addressed to me," is not charging or imputing to such person a crime. To open and read a sealed letter of another is a crime when done without authority and willfully. It is not alleged that defendant charged plaintiff with willfully opening a letter; and therefore the words spoken, standing alone, are not actionable as imputing to the plaintiff a crime. Plaintiff evidently took this view of the question when he drew his complaint for he alleges that the words were actionable, and the defendant meant by the words spoken that he, plaintiff, had willfully and unlawfully opened and read a sealed letter addressed to himself without having been authorized to do so by either the writer

or by the one addressed, and that he did so with the design to pry into the business and secrets of defendant, and that it was so understood by the persons who heard the words spoken. (*Nidever v. Hall*, 67 Cal. 79, [7 Pac. 136].)

The nonsuit should have been granted. As has been seen, the words spoken were not actionable *per se*. Any other verdict than the one rendered would have been clearly against law, being without evidence to warrant it.

It is said in *Green v. Ophir etc. M. Co.*, 45 Cal. 527 [522]: "And it is the settled rule of this court not to reverse judgments for errors in instructions when it is apparent that the verdict would have been the same with correct instructions." If the instructions given were erroneous, and some of them were, the appellant was not injured thereby, because under the pleadings and the evidence he was not entitled to a verdict.

"Where the court lays down an erroneous principle of law, but it appears that nevertheless the verdict of the jury is necessarily correct upon the evidence before them, or where as in this case, a new trial should have been granted if the jury had not returned the special verdict, the error is harmless." (*Hughes v. Wheeler*, 76 Cal. 233, [18 Pac. 386]; *Robinson v. Western Pacific R. B. Co.*, 48 Cal. 424; *In re Spencer*, 96 Cal. 450, [31 Pac. 453]; *In re Briswalter*, 72 Cal. 109, [13 Pac. 164]; *Edwards v. Wagner*, 121 Cal. 378, [53 Pac. 821]; *Mitchell v. Donohue*, 100 Cal. 211, [38 Am. St. Rep. 279, 34 Pac. 614].)

The judgment and the order denying the motion for a new trial are affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 5. Second Appellate District.—June 6, 1905.]

T. C. HARNISS, and MAYMIE B. CLARKE, Respondents,
v. F. H. BULPITT, Appellant.

ACTION TO ABATE NUISANCE—CAPACITY TO SUE—DEMURRER.—In an action to abate a nuisance caused by obstruction of a public alley, upon which plaintiff's property abuts, where there is nothing on the face of the complaint to indicate a want of capacity of the plaintiffs to sue, a demurrer upon that ground was properly overruled.

ID.—PUBLIC NUISANCE—OBSTRUCTION OF PUBLIC ALLEY—CAUSE OF ACTION—SPECIAL INJURY TO PLAINTIFFS.—Though the obstruction of a public alley is a public nuisance, yet where the complaint of the plaintiffs to abate it alleges that ingress and egress to and from the abutting property owned by plaintiff to and from the alley is prevented by the obstruction thereof by fences constructed thereon by the defendant, it states a cause of action for special injury to a private right incidental to the plaintiffs' property, different in kind from that sustained by the public at large.

ID.—MOTION FOR JUDGMENT UPON PLEADINGS.—A motion of the defendant for judgment upon the pleadings was properly denied where the complaint states a cause of action.

ID.—AVERMENT OF PUBLIC ALLEY.—The averment that the strip of ground obstructed was a public alley, and had been so used for twenty-five years as a means of ingress and egress to and from plaintiff's property, is a sufficient statement of fact, without an averment of the manner by which it became a public alley.

APPEAL from a judgment of the Superior Court of Inyo County. Walter A. Lamar, Judge.

The facts are stated in the opinion of the court.

P. W. Forbes, and White Smith, for Appellant.

S. E. Vermilyea, and Ben H. Yandell, for Respondents.

ALLEN, J.—This is an action for damages and to procure an order for the abatement of a nuisance alleged to exist by reason of obstruction by fences at both ends of a public alley in the town of Bishop, Inyo County, this state, upon which alley plaintiffs' property abuts; by which plaintiffs are deprived of the free use of their property and from going from their property out upon said alley, or through the same to Church Street, a public street in said town.

The damages were claimed on account of the depreciation in value, and by reason of being deprived of the use of said alley.

To the complaint a demurrer was interposed upon the grounds,—1. That plaintiffs had no legal capacity to sue; and 2. That the complaint did not state facts sufficient to constitute a cause of action. The demurrer being overruled, defendant answered, denying all the material averments of the complaint, other than the construction of the fences at the places designated in the complaint. The defendant further alleges that the strip of ground denominated a public alley in plaintiffs' complaint was not an alley, but the private property of defendant.

Findings and judgment went for plaintiffs, and a decree was entered enjoining the defendant from maintaining such fences or obstructing said alley. From the judgment defendant appeals.

There being nothing apparent upon the face of the complaint as indicating plaintiff's want of capacity to sue, the demurrer upon that ground was properly overruled.

The principal contention of defendant presented in his points and authorities is, that the complaint does not state a cause of action, because no injury is alleged different in kind from that sustained by the public at large. The nuisance complained of, being the obstruction of a public alley, is a public one. That plaintiff may have redress in a private action, it must appear by proper averment that the plaintiff will suffer some injury therefrom in its nature special and peculiar to him, and different in kind from that to which the public is subjected. (Civ. Code, sec. 3493; *Siskiyou Lumber etc. Co. v. Rostel*, 121 Cal. 513, [53 Pac. 1118].) Applying this test to the complaint, we regard it as sufficient. The allegations that ingress and egress to and from the abutting property owned by plaintiffs, upon or through the alley, is prevented by the obstruction, is an allegation of an injury to a private right incidental to private property. The owner of property abutting upon a street or alley owns the incidental rights to ingress and egress as completely as he does the property to which the rights are an incident. (*Brown v. Board of Supervisors*, 124 Cal. 280, [57 Pac. 82].) An infringement upon these rights is therefore a private wrong.

"When the alleged nuisance would constitute a private wrong by injuring property, or creating personal inconvenience and annoyance for which an action might be maintained in favor of the party injured, the same is none the less actionable because the wrong is committed in a manner which would render the party liable to indictment for a common nuisance." (*Wesson v. Washburn Printing Co.*, 13 Allen, 95, [90 Am. Dec. 181]; *Lind v. City of San Luis Obispo*, 109 Cal. 344, [42 Pac. 437].)

Appellant assigns as error the action of the court in denying defendant's motion for a judgment on the pleadings. The complaint stating a cause of action, there was no error in this judgment.

Appellant's final contention is, that the complaint alleging that the strip of ground was a public alley, and had been so used for twenty-five years as a means of ingress and egress to and from plaintiffs' property, was an insufficient statement of fact, in that the manner by which it became such alley was not averred; and the finding was challenged in the same regard. There is no merit in this contention. The allegation was sufficient, and the findings support the judgment.

Judgment affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 15. Third Appellate District.—June 6, 1905.]

**CALIFORNIA AND NORTHERN RAILWAY, Respondent,
v. STATE OF CALIFORNIA et al., Defendants;
HUMBOLDT RAILROAD COMPANY, Defendant and
Intervener, Appellant.**

EMINENT DOMAIN—CONDEMNATION OF PROPERTY OF STATE—MATURITY OF ACTION.—The right to take the private property of the state in condemnation proceedings in the superior court has been granted by subdivision 2 of section 1240 of the Code of Civil Procedure; and a proceeding therefor begun one day before the taking effect of subdivision 7 of that section cannot be abated as premature.

ED.—APPEARANCE OF ATTORNEY-GENERAL—JURISDICTION OF COURT.—

Where the attorney-general appeared in the case for the state, as it was his duty to do under the provisions of section 472 of the Political Code, the state was just as much in court as though regularly summoned under section 1245 of the Code of Civil Procedure, and the jurisdiction of the court was complete.

APPEAL from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

C. M. Wheeler, for Appellant.

George D. Murray, for Respondent.

BUCKLES, J.—Suit was for condemnation of land belonging to the state, for use of railway. All the defendants having been served with summons, and all having failed to answer except the state of California, default was taken against them. The attorney-general appeared on the part of the state and demurred and answered. Then the Humboldt Railroad Company intervened, filing a complaint in intervention, and also filing an answer to plaintiff's complaint. The plaintiff demurred to the complaint in intervention and to the answer of intervener. The court sustained both demurrers and dismissed the complaint in intervention, and rendered judgment for the plaintiff and against the state of California, on the written stipulation of plaintiff and the attorney-general on the part of the state of California. Judgment was also rendered against intervener.

This appeal is from the whole of the judgment, and is prosecuted as two appeals, one as a defendant in said action and one as an intervener. The points of law being the same in both, we shall consider them together. In both complaint and answer of the Humboldt Railroad Company there is a plea in abatement, and the ground for this plea is that the plaintiff began the suit against the state to condemn state lands, prematurely, and before there was any law in existence granting it authority so to do. The action was begun on March 14, 1901. Appellant claims that at that date no law existed which would authorize the plaintiff to bring such suit, and that such right was conferred by amendment to

section 1240 of the Code of Civil Procedure, which took effect March 15, 1901. The amendment is as follows, to wit:—

“Subd. 7. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and copy of the complaint must be served on the governor, attorney-general, and surveyor-general of the state.” In support of appellant’s contention he cites section 6 of article XX of the constitution, which reads as follows, to wit: “Suits may be brought against the state in such manner and in such courts as shall be directed by law.”

The only question in this case, as appears from the briefs filed, is: Did the plaintiff have a right to bring its action prior to the amendment of section 1240 by adding subdivision 7?

The right to take the private property of the state in condemnation proceedings has been granted by subdivision 2 of section 1240 of the Code of Civil Procedure. The proceedings to condemn must be brought in the superior court, and we are of the opinion that this applies to the state whose property may be taken as well as to individuals. Section 1244 of the same code provides what the complaint in a condemnation proceeding shall state, and as to which no question is suggested in the briefs. Section 1245 provides for the summons and how it shall be served. The attorney-general appeared in the case for the state, and it was his duty to do so under the provisions of section 472 of the Political Code, and when he had so appeared, in a case where the state was a proper party as in this case, the state was just as much in court as though regularly summoned, and the jurisdiction of the court was complete.

The judgment appealed from is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 1. Second Appellate District.—June 7, 1905.]

In the Matter of the Estate of MARTIN CASNER, Deceased. SARAH M. HATFIELD, and A. HATFIELD, Appellants, v. M. V. CASNER, Executor, Respondent.

ESTATES OF DECEASED PERSONS—DECREE SETTLING ACCOUNT AND DISTRIBUTING ESTATE—REVIEW UPON APPEAL.—A decree settling the final account of an executor and distributing the estate of the deceased testator will not be disturbed upon appeal unless the appellants show that their own interests in the estate have suffered by reason of the findings or decree of the court. They cannot object that the surviving wife, who is not before the court, has received less than she was entitled to, nor that they have received some part of the estate that should have gone to her.

ID.—TERMS OF WILL—INTEREST PAID TO SURVIVING WIFE.—Where by the terms of the will the money of the estate was to be loaned out and the surviving wife was to receive the interest as fast as it accrued, the executor was fully authorized in paying the interest to her.

ID.—COMPOUND INTEREST—RIGHTS OF WIDOW NOT REPRESENTED—MISAPPROPRIATION OF ESTATE NOT SHOWN.—The surviving wife being entitled to any compound interest received by the executor, only she or her legal representatives can be heard to complain as to the disposition thereof; and appellants cannot represent her interest, nor can they charge the executor with compound interest in the absence of any showing that he had misappropriated the funds of the estate.

ID.—EVIDENCE—ASSIGNMENT OF INTEREST—CLAIM OF WIDOW TO APPELLANTS—WANT OF CONSIDERATION—PRIOR DEED FOR SUPPORT—UNDUE INFLUENCE.—An assignment by the widow of her claim for interest to the appellants was shown to be without consideration for support, where it appeared that there was a prior obligation of appellants to support her for life in consideration of a deed from her to them; and where the evidence also tended to show that the assignment was procured by undue influence, the action of the trial court in excluding it from evidence will not be interfered with.

APPEAL from orders and judgments of the Superior Court of San Diego County settling the final account of an executor and distributing an estate. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

W. R. Andrews, Cassius Carter, and Carter & O'Farrell,
for Appellants.

Hendrick, Wright & Schoonover, for Respondent.

GRAY, P. J.—This is an appeal from orders and judgments of the superior court settling the executor's account and directing distribution in the above-entitled estate.

It is objected, first, that the account does not show whence or how certain items with which the executor charges himself were obtained. As we understand it, about the only material objection to an item charged against the executor in his account that can be made by a person interested in the estate is that the item is not large enough. No objection of this character seems to be urged, and the other objection, as to uncertainty regarding the source of these items, is met by the evidence taken upon the hearing of the account and the findings of the court. The evidence and findings, taken together, satisfactorily explain the source of all those items with which the executor charges himself.

The amounts paid to Jane Casner, or appropriated by her, as stated in the account, were properly accounted for, and no vouchers for the sums received by her were necessary. Jane Casner was the surviving wife of the deceased, and was co-executrix with her son of decedent's will. She was also a beneficiary under the will, and by the terms thereof she was entitled to all the money appropriated by her. The will provided that the money of decedent loaned out was to be kept loaned out, and the surviving wife was to receive the interest as fast as it accrued. Under this provision of the will the executor was fully warranted in paying this interest to his mother as fast as it accrued, because it belonged to her from the beginning, and the contestants, who are other beneficiaries under the will, had no interest in it whatever. It is not contended that Jane Casner received anything out of the estate except this interest. Nor is it a material objection to the account that it shows that Jane Casner received less of this interest than she was entitled to. That, again, is no affair of the other beneficiaries, and does not tend to show that the executor has failed to account for anything in which the contestants here have any interest.

The fee of one hundred dollars allowed attorneys for preparation of account and for services in connection with the distribution of the estate was reasonable and proper, and appellants have no just cause for complaint thereat.

We can see no just ground for charging the executor with compound interest in the absence of any showing that he received compound interest on any of the moneys of the estate, or was guilty of some misappropriation of the funds or other property of the estate. Besides, as we have already seen, all the interest, compound or simple, belonged to Jane Casner, and her legal representatives are the only persons that can be heard to complain as to the disposition of such interest. The appellants here have no commission to represent the deceased Jane Casner; and the decree of the court below will not be disturbed unless the appellants show that *their* interests in the estate have suffered in some way by reason of the findings or decree of the court. Neither Jane Casner nor her legal representatives are before the court on this appeal. Neither can the appellants here be heard to complain because they received some part of the estate that should have gone to Jane Casner or her legal representatives.

There was evidence tending to show that the assignment of her "claim to interest money" from Jane Casner to appellants was procured by undue influence and without consideration. It was for the trial judge to determine the weight and value of this evidence; and we see no good reason for interfering with his conclusions in the premises, and can see no error in his rejecting the offered assignment as evidence. The consideration recited for this assignment of right to "interest money" in the estate of her deceased husband by Jane Casner was that she should be supported thereafter by the assignees. Those same assignees had some years before this accepted a deed and gone into possession of certain land from Jane Casner. One of the conditions of this deed, and part of the consideration therefor, was, that Jane Casner should live in the family of said assignees (who were her daughter and son-in-law), and should be supported out of said land during her "natural life." Support which they were already bound to give her could hardly form a consideration for the further assignment of property by Jane Casner to the appellants.

Many other reasons are urged or hinted at in appellants'

brief for the reversal of the orders and judgments of the court. We have carefully examined them all and deem them not of sufficient importance to require special discussion.

The orders and judgments appealed from are affirmed.

Smith, J., and Allen, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 7, 1905.

[No. 9. Third Appellate District.—June 7, 1905.]

JOHN SMITH, Respondent, v. M. P. ROBERTS, Respondent; EDWARD S. HICKS, Appellant.

STATE SWAMP LANDS—CONTEST OF RIGHT TO PURCHASE—INTERVENTION BY SETTLER.—Upon a contest of the right to purchase state swamp land, one not a party to the action, who was for a year previous to the time of his application to purchase a settler on the land, which he claims to be fit for cultivation, might intervene before judgment, under the provisions of section 387 of the Code of Civil Procedure, but not after judgment.

ID.—MOTION TO SET ASIDE JUDGMENT FOR INTERVENTION—CONSTRUCTION OF CODE.—Under section 473 of the Code of Civil Procedure only a party to the action or his legal representative can move to set aside a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect; and that section does not authorize a motion thereunder by one who failed to intervene before judgment to obtain the right of intervention after judgment to test his right to the land in controversy.

ID.—NEGLECT OF SETTLER—KNOWLEDGE OF ADVERSE CLAIMS.—Where it appears that before the commencement of the action the settler knew that there were other claimants of the land, and had been notified by the surveyor-general of the reference of their claims for contest, it was his duty to look after his rights by intervention pending the action.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order refusing to vacate and set aside the judgment and denying leave to intervene. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Ernest Sevier, and Denver Sevier, for Appellant.

Appellant's rights as an actual settler were protected by the constitution and the law. (Const., art. XVII, sec. 3; *Fulton v. Brannan*, 88 Cal. 454, 26 Pac. 506; *Goldberg v. Thompson*, 96 Cal. 117, 30 Pac. 1019; *Belcher v. Farren*, 89 Cal. 73, 26 Pac. 791.) One not a party who has an interest to protect may apply to set aside a judgment affecting his rights. (*People v. Hektograph Co.*, 10 Abb. N. C. 358; *Gould v. Mortimer*, 26 How. Pr. 167; *Kellogg v. Howell*, 62 Barb. 280; *Brettell v. Deffebach*, 6 S. Dak. 21, 60 N. W. 167; 17 Am. & Eng. Ency. of Law, 2d ed., p. 839; *People v. Grant*, 45 Cal. 97; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *People v. Walker*, 132 Cal. 142, 64 Pac. 133.)

George D. Murray, for Respondent.

There could be no intervention after judgment. (Code Civ. Proc., sec. 387; *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 37 Pac. 767.) Section 473 of the Code of Civil Procedure does not apply to an intervener who is not a transferee. (*People v. Mullan*, 65 Cal. 396, 4 Pac. 348; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; Freeman on Judgments, sec. 91; 15 Ency. of Plead. & Prac., 249; *Brettell v. Deffebach*, 6 S. Dak. 21, 60 N. W. 167.)

BUCKLES, J.—The appeal is from the judgment and from the order denying the motion of Hicks to vacate and set aside the judgment and denying to said Hicks permission to intervene.

The action is one brought under section 3414 of the Political Code for the purpose of deciding conflicting claims of the plaintiff and the defendant to purchase from the state certain swamp and overflowed lands near the town of Arcata, in Humboldt County.

The judgment was rendered September 16, 1901. Motion to set aside judgment and to permit the said Edward S. Hicks to intervene was made on December 5, 1901, and denied on the eleventh day of January, 1902. Said Hicks was a settler on the land, and claims he tried to file an application with the surveyor-general of California to purchase said land, but was prevented from doing so by the surveyor-general informing him that there was then a contest pending. The plaintiff had

filed an application prior to the attempt of the said Hicks to file. One or two other parties had also filed prior to the time when Hicks forwarded his application.

There is no question that appellant might have intervened before judgment, under the provisions of section 387 of the Code of Civil Procedure, as he alleges he was at the time of, and for a year previous to the time of, making his application to purchase, a settler on said land, and the land was suitable for cultivation. (*Fulton v. Brannan*, 88 Cal. 454, [26 Pac. 506]; *McNee v. Lynch*, 88 Cal. 519, [26 Pac. 508].)

But unless there is some way by which the judgment can be set aside there is now no way for appellant to intervene. He claims that under the provisions of section 473 of the Code of Civil Procedure he should have the judgment set aside for the purpose of allowing him to intervene. The provision is: "The court may, in furtherance of justice, . . . also upon such terms as may be just, relieve a *party or his legal representative* from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect." But appellant was neither a party nor the legal representative of a party to the action. His contention is, however, that being a settler on the land which has become fit for cultivation, and thereby having a right to purchase superior to other claimants under sections 2 and 3 of article XVII of the constitution, he has such right in the subject of the litigation as will permit him to have the judgment set aside for the purpose of allowing him to intervene to test his right, and cites the following authorities to sustain that contention.

Brettell v. Deffebach, 6 S. Dak. 21, [60 N. W. 167]. In this case Milliken, the mover, was not a party to the action, but was assignee of one of the defendants of the lands which furnished the subject of the action. The judgment was taken by default against his assignor, and he was permitted to have the judgment set aside. But it will be observed that he had succeeded to the interests of the defendant in the action.

Kellogg v. Howell, 62 Barb. 280. Defendant Howell was adjudged a bankrupt on August 23, 1871. There was an existing mortgage on his land and the land sold by the sheriff on foreclosure decree to the plaintiff Kellogg on January 20, 1872, for the sum of \$2,107. The assignee of the bankrupt,

under an order in the bankrupt proceedings, had sold the land the day before, or the equity of redemption, for the sum of \$1,410, to Easton. In February Easton conveyed by deed to O'Donnell, and O'Donnell then moved to set aside the mortgage sale of January 20, 1872. No order had been made confirming the mortgage sale. It will thus be seen that O'Donnell was the holder of the equity of redemption of the land for which he had paid \$1,410, and had, therefore, such a right, or such a standing, the court held, as to the equity of redemption as would enable him to invoke the equity power of the court over the judgment and sale. In *Gould v. Mortimer*, 26 How. Pr. 167, the action was a foreclosure of mortgage, and the moving party, not a party to the action, was the owner of the equity of redemption by purchase from the mortgagor, and sought to have set aside a sale of the premises made pursuant to a decree of foreclosure of said mortgage. The court heard his motion and set aside the sale, remarking that "Every person whose rights are injuriously affected by the judgment or proceedings under it has the right to move the court to set aside or amend them, although he is not a party to the suit."

Freeman on Judgments is also cited as authority on the proposition that any one who is interested in the subject-matter of the suit can move to have the judgment set aside, but the instances given by that author are all in a line with the ones just quoted, and we think none of the authorities apply to a case like the one under consideration. Whatever right the appellant had to the land in this suit he had before and when the suit was commenced, and he had his remedy. His first duty was to prepare and file with the surveyor-general an application to purchase. This he claims to have done, but the surveyor-general refused to receive or file his application, and returned it to him, assigning his reasons for not filing it, that the lands applied for were covered by application No. 3,556 filed June 14, 1901, by M. P. Roberts, and stating also that the same had been referred to the superior court of Humboldt County for adjudication. The matter was on July 9th again referred to the superior court of Humboldt County, and suit was not commenced thereon until August 31st. It thus appears that long prior to the action being brought appellant knew there were other claimants to pur-

chase said land and that they were moving to perfect their claims, and was notified by the surveyor-general that the whole matter had been referred to the court for adjudication. The action, when commenced, was of some notoriety, comments being made in the public press concerning it. With the knowledge he had it was his business and his duty to look after his rights. He took no steps to contest the claims of the others, and it surely does not appear that he was kept in ignorance of his rights by any act of fraud on the part of any one. It is true the plaintiff exercised all the haste he could in filing and thereafter went about in a somewhat deliberate way in perfecting his claim. The victory is not always to the strong, but sometimes to the vigilant as well. It is true, as counsel say, there is never a wrong without its remedy, but a remedy to be available must be pursued within its lifetime. Time and neglect often destroy the right to pursue a sufficient and proper remedy. So in this case the appellant neglected to take advantage of this particular remedy open to him when it was proper to do so.

We know of no rule in the state of California which will permit a person not a party to the action nor the successor in interest of a party to the action, to come in after judgment and have the judgment set aside for the sole purpose of allowing him to intervene that he may contest a right to the property which was the subject of the action.

The judgment and order appealed from are affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 14. Third Appellate District.—June 7, 1905.]

F. W. YOUREE, Appellant, v. R. J. YOUREE, Respondent.

DIVORCE—APPLICATION FOR ALIMONY—HEARING—AFFIDAVIT NOT COMPLYING WITH RULE—DISCRETION.—Upon the hearing of an application of a wife for alimony *pendente lite*, the court had discretion to permit her counsel to present his affidavit, though not served one day before the hearing, as required by a rule of the court.

Id.—REFUSAL OF CONTINUANCE TO HUSBAND—COUNTER AFFIDAVIT—FACTS AND CIRCUMSTANCES NOT EXPLAINED.—The husband was not deprived of any substantial right by refusal of a continuance to

obtain a counter affidavit of his attorney that a transfer of certain property to him was *bona fide*, where there is no offer to explain other facts and circumstances calling for explanation, and the offer made was not sufficient to require the court to deny the alimony granted.

Id.—DISCRETION TO ALLOW ALIMONY—BASIS OF ORDER—AMOUNT.—The court has discretion to require the husband to pay as alimony any money necessary to enable the wife to support herself or her children or to prosecute or defend the action; and in seeking information as the basis of its order is not bound by technical rules of evidence. The amount to be allowed is as much within the discretion of the court as its power to make the allowance; and its action will not be disturbed where no abuse of discretion is shown.

APPEAL from a judgment of the Superior Court of Mendocino County. J. W. Mannon, Judge.

The facts are stated in the opinion of the court.

Weldon & Held, for Appellant.

T. L. Carothers, for Respondent.

CHIPMAN, P. J.—Divorce. Judgment in favor of defendant for two hundred dollars "for personal expenses and alimony pending suit," and one hundred dollars "for expenses of trial, taking depositions, and procuring attendance of witnesses," and two hundred dollars "as counsel fees, and that said sums be so paid in thirty days from said tenth day of June, 1902." Plaintiff appeals from the judgment on bill of exceptions.

Plaintiff seeks a divorce from his wife, the defendant, on the alleged ground of desertion. Defendant denies the allegations of the complaint, and, by way of cross-complaint, herself seeks a divorce on the grounds of desertion, failure to provide the common necessities of life, and the adultery of plaintiff. The pleadings are verified. The complaint was filed March 27, 1902, and the answer and cross-complaint filed May 23, 1902. On May 24, 1902, defendant filed an affidavit and notice of motion for alimony and expenses of suit. In her affidavit she averred that she "has no money or property whatever and is wholly dependent upon her labor and the charity of her friends for support." In her cross-complaint, to which no answer appears, she describes certain land

of which she avers that plaintiff is the owner and which is of the value of six thousand dollars; also personal property, consisting of certain enumerated articles and securities of the aggregate value of five thousand dollars. In her affidavit she states that said property, real and personal, is of the value of ten thousand dollars. On June 7, 1902, plaintiff filed an affidavit in which, among other things, he avers that he "is not possessed or the owner of any real estate, or personal property or securities or money whatever, and his sole property consists of his right to a government homestead, the title to which is as yet vested in the United States," which said homestead he avers is of no greater value than one hundred dollars, and that he has no income except the produce of this homestead, which he avers "is only sufficient to enable him to support himself and consists principally of foodstuffs and said income of said homestead claim consists of small, or any portion thereof of cash." The motion was noticed for hearing June 9th, and on that day, at the hearing, defendant's attorney was permitted, over plaintiff's objection, to file an affidavit, copy of which had not been served one day before the hearing, as required by rule II of the court. In this affidavit it was averred that at the time defendant filed her answer and cross-complaint plaintiff was the owner of the property described therein and the title remained in him until June 7, 1902, (two days before the hearing of the motion,) and on that day plaintiff conveyed the said real estate to one T. J. Weldon (one of plaintiff's attorneys in the action), and on the same day also conveyed to him a note secured by mortgage owned by plaintiff, for the sum of twelve hundred and fifty dollars to said Weldon for the consideration of one thousand dollars, as expressed in the assignment of said note and mortgage. It is further averred on information and belief that said transfers "were and are not real and plaintiff is now the owner in fact of said real estate and said note and mortgage," and that said transfer was made "for the purpose, fraudulently and designedly, of hindering and obstructing the defendant in procuring alimony, counsel fees and costs of this action, and that no consideration whatever was paid to plaintiff for said conveyance and assignment," etc. Counsel for plaintiff asked leave, at the hearing, for time to prepare and file the affidavit of said Weldon in reply to the said affidavit of

defendant's attorney and to show that said transfers were *bona fide* and not in fraud of defendant's rights. The court "stated that it would permit plaintiff to file an affidavit denying said transfer by plaintiff to said T. J. Weldon . . . if said transfer had in fact not been made, and counsel for plaintiff thereupon stated that they did not wish to controvert the fact of said transfer," but desired to show "that a *bona fide* sale of the property of said plaintiff had been made to said T. J. Weldon." The court refused "to permit plaintiff or his counsel to file said affidavit," to which ruling plaintiff excepted.

1. It was within the discretion of the court to permit defendant's counsel to file his affidavit at the hearing, although in violation of a rule of the court (*Pickett v. Wallace*, 54 Cal. 147); and we do not think this discretion was abused in ruling as it did.

2. It will be observed that plaintiff did not deny having owned the property in question nor did he deny having made the alleged transfers, but proposed only to show a *bona fide* sale of certain of the property. He does not show or offer to show what he did with the consideration received, nor how it came about, in so short a time, that he was reduced in his property holdings (which were of the undisputed value of ten thousand dollars) to his unproductive homestead. There was certain personal property mentioned in defendant's cross-complaint, other than the real estate described and the note and mortgage transferred to Weldon. No account is given of this and no denial of its possession, except as it may be inferred that when he made his affidavit he *then* had nothing but his homestead. We think the facts and circumstances disclosed called for something more than the offer as made by plaintiff's counsel and that the court did not err in passing upon the motion without giving plaintiff the permission he asked. The offer was not sufficient to introduce any fact which, if admitted, would have required the court to deny the motion for alimony. We do not think plaintiff was deprived of any substantial right in view of the facts disclosed.

3. The court "may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." (Civ. Code, sec. 137.) It was said in *Rose v. Rose*, 109 Cal. 544, [42 Pac. 452]: "In taking the evidence for the

purpose of finding the amount of the allowance the court is not trying an issue in the case, but is seeking for information as the basis of its order, and is not bound by the technical rules of evidence applicable to controversies between contesting litigants." The amount to be allowed by the court is as much within its discretion as is the power to make the allowance, and in neither case will the appellate court set aside its action unless this discretion has been abused; and we do not think abuse of discretion has been shown in the present case. (*Rose v. Rose*, 109 Cal. 544, [42 Pac. 452]. See, also, *Anderson v. Anderson*, 137 Cal. 225, [69 Pac. 1061].)

The judgment and order are affirmed.

Buckles, J., and McLaughlin, J., concurred.

[No. 7. Third Appellate District.—June 10, 1905.]

PHOENIX INSURANCE COMPANY, Appellant, v. PACIFIC LUMBER COMPANY, Respondent.

NEGLIGENT DESTRUCTION OF PROPERTY BY FIRE—ASSIGNED CLAIM TO FIRE INSURANCE COMPANY—ACTION FOR DAMAGES—STATUTE OF LIMITATIONS.—An action by a fire insurance company upon the assigned claim of an insured person for loss of the insured property by fire, which was negligently kindled on defendant's land and negligently suffered to extend to the land of the insured, to recover the actual damages and costs suffered, is barred by section 339 of the Code of Civil Procedure if not brought within two years after the cause of action accrued.

Id.—STATUTORY PROVISIONS INAPPLICABLE—TREBLE DAMAGES.—The three years' statute of limitations prescribed by section 338 is inapplicable to a cause of action for the actual damages presupposed in the treble damages provided for in section 3344 of the Political Code for negligently causing loss by fire. An action for actual damages for such loss would lie regardless of the provisions of the latter section. Treble damages cannot be recovered thereunder where neither the complaint nor the assignment nor the plaintiff's equitable right of subrogation will admit thereof.

Id.—SUBROGATION—SPECULATION NOT ALLOWED.—Subrogation is allowed by courts of equity solely to insure reimbursement and secure justice. The party subrogated will not be allowed to make a speculation out of this equitable right to be indemnified against unjust loss.

APPEAL from a judgment of the Superior Court of Humboldt County. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, and J. F. Coonan, for Appellant.

The liability fixed by section 3344 of the Political Code is fixed by statute, and is barred in three years. (Code Civ. Proc., sec. 338; *Higby v. Calaveras County*, 18 Cal. 176; *Banks v. Yolo County*, 104 Cal. 258, 37 Pac. 900.)

Ernest Sevier, and Denver Sevier, for Respondent.

The action is barred by section 339 of the Code of Civil Procedure. Section 3344 merely affords a remedy in treble damages, but does not create a liability for actual damages for the negligence, which is a common-law right, independent of that statute. (*Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Brummit v. Furness*, 1 Ind. App. 401, 50 Am. St. Rep. 215, 27 N. E. 656; *Webb v. Rome etc. R. R. Co.*, 49 N. Y. 420, 10 Am. Rep. 389; *Spaulding v. Chicago etc. Ry. Co.*, 30 Wis. 110, 11 Am. Rep. 550; 13 Am. & Eng. Ency. of Law, 2d ed., p. 410; *Liverpool etc. Ins. Co. v. Southern Pacific Co.*, 125 Cal. 434, 58 Pac. 55; *Cleland v. Thornton*, 43 Cal. 437; *Louisville etc. R. R. Co. v. Nitsche*, 126 Ind. 230, 22 Am. St. Rep. 582, 26 N. E. 51.) All actions for actual damages for negligence are barred in two years. (*Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; *Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42; *Wood v. Currey*, 57 Cal. 208; *Raynor v. Mintzer*, 72 Cal. 585; *Churchill v. Pacific Imp. Co.*, 96 Cal. 490, 31 Pac. 560.)

McLAUGHLIN, J.—On October 28, 1901, the plaintiff filed its complaint in proper form, alleging, in apt and sufficient terms, that certain property of one Hazleton was insured by plaintiff against loss by fire. That on May 11, 1899, while said insurance was still in force, the defendant willfully and carelessly kindled a fire on its own land, and negligently suffered the said fire to extend beyond its own land, to and upon the land of Hazleton, and that said fire destroyed the property insured; all of said negligent acts being “*contrary to statutory provision* under section 3344 of the Political Code

of this state." That thereafter said Hazleton proved his loss, and the same, amounting to \$786.77, was paid to him by plaintiff. It is then alleged that by virtue of a written assignment from Hazleton, as well as by subrogation, such rights of action as accrued to Hazleton by reason of such negligent acts, passed to plaintiff. The prayer is for "judgment in the sum of \$786.77 as *actual damages*, and costs of suit."

The defendant demurred to the complaint on the ground, among others, that the causes of action set forth therein were barred by sections 339 and 340 of the Code of Civil Procedure. The demurrer was sustained and the plaintiff appealed.

Appellant contends that the causes of action stated rest upon section 3344 of the Political Code, which reads as follows: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in *treble damages*." This, he contends, brings this cause within section 338 of the Code of Civil Procedure, which provides that "An action upon a *liability* created by statute, *other than a penalty or forfeiture*," must be brought within three years. Respondent answers that if the action is upon a statute, it is upon a *penalty* created by statute, and hence that section 340, limiting the time for commencing such actions to one year, applies. And respondent also submits that this is simply an action to recover *actual damages*, and therefore falls within the provision of section 339, making the limitation of two years apply to all actions upon a *liability* not founded upon an instrument in writing. It cannot be doubted that an action for *actual damages* in cases such as the one at bar would lie, regardless of the provisions of section 3344 of the Political Code. The very idea of *treble damages* involves the concurrent idea of *actual damages trebled*, and hence, in the section itself, the pre-existence of the right to actual damages is recognized. The section simply gives the further right to treble damages under proper pleadings. In this case all that is asked is "\$786.77 *actual damages*," and it is elementary that relief cannot exceed the demand. The written assignment from Hazleton to appellant carefully limits the transfer to the indemnifying sum here sought to be recovered, and expressly states that such sum is the *actual value* of the property destroyed. Subrogation is allowed by courts of equity

solely to insure reimbursement and secure justice. The party subrogated will not be allowed to make a speculation out of this equitable right to be indemnified against unjust loss. (*Liverpool etc. Ins. Co. v. Southern Pacific Co.*, 125 Cal. 440, [58 Pac. 55]; *Randall v. Duff*, 107 Cal. 34, [40 Pac. 20]; 27 Am. & Eng. Ency. of Law, p. 207.) It follows that neither under the complaint, the written assignment, nor the doctrine of subrogation could the appellant recover the treble damages allowed by section 3344 of the Political Code. Therefore, this action having been commenced more than two years after the cause of action accrued, it was barred by the statute.

The judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 11. Third Appellate District.—June 10, 1905.]

R. HILL, Respondent, v. C. L. McCOY, Appellant.

ACTION FOR BROKER'S COMMISSION—MEMORANDUM OF AGREEMENT—DESCRIPTION OF LAND—PLEADING—LOCATION AND IDENTIFICATION—DEMURRER.—In an action by a real-estate broker to recover commission on the sale of land under a written memorandum sufficient under the statute of frauds, but describing the property by name and acreage only, the complaint, after setting forth such memorandum *in haec verba*, properly made additional averments to locate and identify the property. Neither a general demurrer to such complaint, nor a special demurrer for ambiguity and uncertainty on the ground of variance from the memorandum pleaded, is sustainable.

Id.—PAROL EVIDENCE.—Parol evidence was admissible to prove such identifying averments at the trial. Parol evidence is always admissible to identify land referred to by name in a contract.

Id.—CURE OF RULINGS AGAINST EVIDENCE.—Rulings against the admissibility of evidence are, if erroneous, cured by the further full testimony of the witness to the same matters.

Id.—SUPPORT OF FINDING—EARNING OF COMMISSION—TERMS FIXED BY OWNER.—Where the contract provided for commission at a certain rate for procuring a sale upon terms fixed by the owner, a finding that plaintiff earned the commission sued for by procuring a purchaser with whom he sought to negotiate a sale, which was finally made by the owner upon terms fixed by him without plaintiff's

knowledge during the life of the agreement, is sufficiently supported, notwithstanding conflict in the evidence, where the trial court might reasonably infer as a fact that the sale was effected through plaintiff's agency as its procuring cause.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

John T. Carey, for Appellant.

Clarence F. Lee, for Respondent.

CHIPMAN, P. J.—Plaintiff brought the action to recover commission as broker for the sale of defendant's land. The cause was tried by the court without a jury and plaintiff had judgment, from which defendant appeals on bill of exceptions.

The court found that plaintiff and defendant on September 22, 1900, entered into a contract by which plaintiff was "authorized to and agreed to act as broker to bargain for and procure a purchaser for 47 acres of land with the improvements thereon, at that time owned by said defendant," known as the Abbey ranch; that it was further agreed "that if said ranch was sold to a purchaser procured by said Hill [plaintiff] or through his agency that said defendant would pay to said plaintiff 5 per cent on \$10,000 or any less amount that said defendant might accept for said ranch"; that "at the time said contract was entered into a memorandum thereof, in writing, was made and executed and subscribed by said defendant, the party to be charged thereby, and delivered to the plaintiff by him . . . as follows, to wit: 'I hereby authorize R. Hill of Windsor, Cal., as broker, to bargain for the sale of 47 acres (known as the Abbey ranch) with the improvements thereon—valued at \$10,000—for which service I agree to pay to said Hill 5 per cent on the above-mentioned sum or any less amount I may accept for said ranch. Provided said ranch is sold to a purchaser procured by said Hill or through his agency. Sept. 22nd, 1900. C. L. McCoy'"; that "in pursuance of said contract and agreement plaintiff procured a purchaser, John Fopiana, who purchased said ranch from defendant" at the price of \$7,500, accepted by defendant, and

to said Fopiana a good and sufficient deed was made by defendant November 22, 1900, and possession delivered.

As conclusion of law the court found that plaintiff was entitled to judgment for \$375, "commission for the sale of said ranch and improvements thereon," and interest from November 22, 1900, and judgment passed accordingly.

1. Defendant demurred generally to the complaint, and also specifically, alleging ambiguity and uncertainty, because, as is claimed, the contract pleaded, in its legal effect, is at variance with and is different from the contract set out in *hac verba*. It is claimed that the demurrer should have been sustained.

It is permissible to declare on a contract either by pleading its legal effect or in *hac verba* (*Stoddard v. Treadwell*, 26 Cal. 294); and, where the contract is in writing, the latter is regarded as the better mode. "But," as was pointed out in *Joseph v. Holt*, 37 Cal. 250, "to enable the pleader to adopt this latter mode, the instrument which is thus adopted as a part of the complaint must show *upon its face* in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment. For example: a note or memorandum in writing of a contract may be sufficient to take it out of the statute of frauds, but prove insufficient as a pleading when put to use for that purpose." In the present case, we think the contract signed by defendant was sufficient as a "note or memorandum thereof," under subdivision 6 of section 1624 of the Civil Code, and was valid within the meaning of the section, but it failed to state with fullness and precision sufficient to permit its use alone as a pleading, and hence it became necessary, and it was entirely within the rules of pleading, to set forth, in aid of the memorandum, the facts essential to make the pleading complete. The complaint does not set forth more than one cause of action, nor is it ambiguous or uncertain. In stating where the so-called "Abbey Ranch" is situated, where the memorandum failed to do so, the pleader merely supplied a fact which it was competent to prove at the trial. Where the contract is set out, if it is uncertain, "the pleader must put some definite construction on it by averment." (*Durkee v. Cota*, 74 Cal. 313, [16 Pac. 5]; *Lambert v. Haskell*, 80 Cal. 611, [22 Pac. 327].) The only material

fact set out in the complaint, and not substantially appearing in the memorandum, is the fact as to the location of the land with a view to identification. We do not think the complaint was obnoxious to the objections raised by the demurrer.

2. Against the objection of defendant the land in question was identified and proved at the trial as the land referred to in the contract. From what has already been said, it would follow that proof by parol, to identify the land referred to as the "Abbey Ranch," was permissible. Such proof is always allowed for the purpose of identifying land described as in the contract before us. (Code Civ. Proc., sec. 1860.) It is sufficient to describe the land by its general designation, as "The Norris Ranch" (Civ. Code, sec. 1092) in a grant deed; and undoubtedly parol evidence is admissible to show what ranch is meant by such a designation. In *Toomy v. Dunphy*, 86 Cal. 639, [25 Pac. 130], it was held that where the contract was silent as to the commission to be paid or the character of the services precisely stated, they could be shown by parol; and in *Preble v. Abrahams*, 88 Cal. 245, [22 Am. St. Rep. 301, 26 Pac. 99], evidence was admitted to show what land was meant by the phrase "forty acres of the eighty-acre tract at Biggs." (See *Pomeroy on Contracts*, sec. 227, note; *Reamer v. Nesmith*, 34 Cal. 624.)

Upon his cross-examination as a witness plaintiff was asked certain questions to which plaintiff's objections were sustained. If there was error it was cured by the fact that the witness testified thereafter fully to the matters thus sought to be brought out.

3. It is urged that the evidence is insufficient to support the findings. We do not feel called upon to recite the evidence tending to show to what extent plaintiff was instrumental in effecting a sale of the property to Fopiana or that it was "sold to a purchaser procured by said Hill, or through his agency," as the agreement provides. He was authorized "to bargain for the sale of 47 acres" of the Abbey ranch, and, if sold to a purchaser procured by him or through his efforts, he earned his commission. We think there is sufficient evidence to support the findings upon these provisions of the agreement.

The rule laid down in *Dolan v. Scanlan*, 57 Cal. 261, has been frequently referred to with approval, and expresses the

true rule as we understand it, namely: "The commission of a broker is earned by finding a sufficient purchaser ready and willing to enter into a valid contract for the purchase, upon the terms fixed by the owner, and having introduced such a one to the owner, as a purchaser, he is not deprived of his right to a commission by the owner negotiating the contract himself." (See the rule considered in *Phelan v. Gardner*, 43 Cal. 306; *Oullahan v. Baldwin*, 100 Cal. 648, [35 Pac. 310]; *Crawford v. Independent Stone Pipe Works*, 83 Cal. 629, [24 Pac. 836]; *Ayres v. Thomas*, 116 Cal. 140, [47 Pac. 1013]; *Gregory v. Bonney*, 135 Cal. 589, [67 Pac. 1038].) Cases cited by the appellant where the time was limited within which the sale was to be made or where the authority had been seasonably revoked do not apply. Here there was no limit as to time, and the sale was made within fifty days after his authority was given, during all which time plaintiff was more or less active in endeavoring to complete the sale to Fopiana, whom plaintiff introduced to defendant as a possible purchaser.

It is urged that because plaintiff admits that he did not finally negotiate the sale in person, and did not know until after it was finally completed that a sale had been perfected, he therefore failed to earn his commission. (Citing *Zeimer v. Antisell*, 75 Cal. 512, [17 Pac. 642], and *Ayres v. Thomas*, 116 Cal. 144, [47 Pac. 1013].) The first of these cases went off on the fact that the agent did not effect a sale within the time limit. In the second the decision hinged upon certain instructions. But the rule was approved that commissions are earned when the evidence shows that the broker was the moving or procuring cause of the consummation of the transaction. Appellant cites *Wylie v. Marine National Bank*, 61 N. Y. 415, as very similar to the case at bar. This case enunciates no different rule from that claimed by respondent. It was held, however, that where the broker opens negotiations, but, failing to bring the customer to the specified terms, abandons further negotiation, and the employer sells to the same person at the price fixed, he is not liable to the broker for his commissions. We do not think the evidence warrants appellant's claim that plaintiff had abandoned his efforts to make a sale; the case in its facts differs materially from the *Wylie* case, 61 N. Y. 415. *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, [38 Am. Rep. 441], is relied on by appellant, and is

a case often cited approvingly as a correct exposition of the principles upon which brokers may claim commissions. That case, however, differs from this in the very essential fact that after a reasonable time, some four months, within which to make the sale, and, being unsuccessful, the employer terminated the broker's agency, which the court held he could do, the commissions not having been earned, "unless upon the sole and only ground that the defendant terminated the agency in bad faith and as a device to get the benefit of plaintiff's labors without paying for them." That case is inapplicable and in no wise supports appellant's contention. See the principles here involved, somewhat discussed in *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, [79 Pac. 354], where the time limit having expired before sale made was the principal ground on which the employer successfully resisted payment of commissions to the broker.

There was evidence tending to show that defendant, some time in the summer of 1900, placed the property in the hands of one Scott as agent for its sale, and that, through one Foerstler, the sale to Fopiana was finally consummated. Scott's authority preceded that given plaintiff, but it was not until after plaintiff had brought Fopiana and defendant together for the purpose of effecting a purchase and sale that Scott had anything to do with the sale of Fopiana. Indeed, he supposed he was making the sale to Foerstler, until later, when a deposit was made, he learned that the purchaser was Fopiana, and he then recognized Foerstler as his co-agent in the transaction. Plaintiff testified: "At the time Mr. McCoy signed the authorization to me he told me that he had an exclusive contract with Mr. Scott of Healdsburg and he asked me to divide the commission with him if I made a sale. I told him I was not working for Mr. Scott." Defendant at no time revoked his authority given to plaintiff. It appears that Fopiana was seeking a farm for his two sons, and was looking at what was called the Prouse place, at plaintiff's suggestion, while considering defendant's place. As late as November 10, 1900, he employed plaintiff to attend the auction sale of the Prouse place and bid for him. It was sold at a price too high for Fopiana, and failing to get it plaintiff again took up with him the purchase of defendant's place, and plaintiff testified that Fopiana then told plaintiff he

would give eight thousand dollars for defendant's place, and it was arranged, according to plaintiff's testimony, that Fopiana's two boys should go and look at the place the next day (Sunday), which they did, and Fopiana was to notify plaintiff "if he could take it."

It appears that about this time Fopiana fell in with Foerstler and thenceforward conducted the business of purchase with him without plaintiff's knowledge, and on Monday, November 12, 1900, made a deposit with Scott of one thousand dollars on account of the purchase. There is some evidence tending to show that Scott and Foerstler were working together in the matter some little time before November 10th, but plaintiff was not informed of the fact (if that would make any difference, which we doubt) by either defendant or his agents, Scott and Foerstler, or by the Fopianas, and plaintiff first learned of the sale about November 15th, as he testified. Not having been revoked, his authorization was in full force when the sale took place, November 12th, though the deed did not pass until later.

There may be some doubt as to the precise meaning of the language, "to bargain for the sale," used in the agreement. But no doubt can surround the meaning of the language, "Provided said ranch is sold to a purchaser procured by said Hill, or through his agency." Defendant thus agreed to pay the commission if the ranch was sold to a purchaser brought to defendant by plaintiff directly or through his efforts.

The fact that the sale was made for less than ten thousand dollars does not affect the question, for the agreement provided that defendant would pay the commission on any less amount that he might accept for the ranch.

It was held in *Lloyd v. Matthews*, 51 N. Y. 124, that where the owner has placed his property in the hands of two or more brokers to sell, notice to one of a change of purpose does not affect another; and if the broker's communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale. (*Dolan v. Scanlan*, 57 Cal. 261. See, also, *Sussdorff v. Schmidt*, 55 N. Y. 319.)

In cases like the present one it is not always entirely obvious that the sale was effected through the broker's agency

as its procuring cause. There is always a possibility that had the broker not brought the seller and buyer together, some other broker might have done so, or the parties might have met by chance and through no agency of any broker, and hence it might be said the employed broker was not the procuring cause of the sale. But where it appears, as here, that the seller and buyer were for the first time brought together by the broker duly authorized to act for the seller, and the sale was subsequently consummated by the same seller and buyer, acting independently of the broker, the broker not having abandoned his agency, and the seller not having revoked the broker's authorization or done any act from which a revocation may be implied, we think the inference is a reasonable one, and may be drawn by the jury, that a sale under such circumstances is effected through the broker's agency as its procuring cause. Especially may this inference be drawn where both seller and buyer have negotiated with knowledge of the broker's previous employment.

It is true that there was sharp conflict in some of the testimony; but upon the trial court alone devolved the duty as well as the power to finally reconcile controverted questions of fact, and with its determination where a conflict in the evidence arose we cannot concern ourselves.

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

[Crim. No. 9. Second Appellate District.—June 12, 1905.]

THE PEOPLE, Respondent, v. J. W. HEART, Appellant.

CRIMINAL LAW—JURISDICTION OF COURTS OF APPEAL—QUESTIONS OF LAW—SUPPORT OF VERDICT.—By the constitution, jurisdiction is conferred upon the district courts of appeal in criminal prosecutions by indictment or information in a court of record on questions of law alone. Where there is some evidence to sustain the verdict, there can be no question of law as to its sufficiency.

Id.—MURDER—SUPPORT OF CONVICTION IN SECOND DEGREE.—Upon a trial for murder where the defendant was convicted of murder in the second degree, held, in view of the evidence, that it cannot

be said as matter of law that the killing was done "upon a sudden quarrel or heat of passion," or that there was no evidence of the "abandoned and malignant heart" constituting one of the elements of murder in the second degree.

1D.—EVIDENCE—IMPEACHMENT OF DEFENDANT'S WIFE—STATEMENT OF KNOWLEDGE TO ATTORNEY—COMMUNICATION NOT PRIVILEGED.—Upon cross-examination of defendant's wife as a witness for defendant it was proper on cross-examination to lay the foundation for impeaching evidence by an attorney to whom she stated her knowledge of the transaction, while endeavoring, without success, to retain him as counsel for the defendant. Such statement is not a privileged communication under section 1881 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

L. C. Hester, Hester & Ladd, A. Groves, and James D. Reymert, for Appellant.

U. S. Webb, Attorney-General, J. C. Daly, Deputy Attorney-General, and W. C. Van Fleet, for Respondent.

ALLEN, J.—The defendant under an information charging him with murder pleaded not guilty. Upon a trial he was found guilty of murder in the second degree, and sentenced to the state prison for the term of twenty years. He appeals from the judgment and from the order denying a new trial.

Appellant relies for the reversal of the order and judgment upon the grounds that the evidence is not sufficient to justify a verdict in the second degree, and for errors in admission of certain testimony and in instructions to the jury.

The record discloses that there was some testimony tending to show defendant's guilt in the degree as found by the verdict. By the constitution appellate jurisdiction is conferred upon this court in criminal prosecutions by indictment or information in a court of record on questions of law alone. When there is evidence, therefore, to sustain the verdict a question of law cannot arise. (*People v. Fitzgerald*, 138 Cal. 40, [70 Pac. 1014].)

It was shown that a heated quarrel was had between defendant and his roomer, Kearns, concerning a balance of fifty cents due for rent, as claimed by defendant and denied by Kearns. Kearns was about to leave defendant's house, and had packed his personal effects for that purpose, when defendant appeared and demanded the fifty cents. The deceased presented a receipt for rent to July 8th; this was July 2d. Defendant charged deceased with changing the receipt. Kearns thereupon becoming loud and violent in his language, defendant left the scene of the quarrel declaring that he would call the police. Some fifteen or twenty minutes later he returned without the police, but with a pistol in his right-hand coat pocket. He advanced across the room and locked the back door of one of the rooms from which deceased was getting ready to leave. He did this, he says, as a preliminary step to distraining the goods of his roomer for the delinquent fifty cents. Kearns thereupon assaulted him with his fists, and in the scuffle which ensued the defendant shot Kearns in the stomach. There was evidence tending to show that Kearns was unarmed. In this state of the evidence it was for the jury to determine whether defendant returned to the scene of the quarrel simply to lock the door and distrain the goods, or whether, knowing that Kearns was disposed to fight, the defendant armed himself for the purpose of returning and renewing the quarrel with a view of precipitating a final struggle and killing his antagonist. It must have been plain to defendant from the previous conduct of his roomer that any attempt to wrest from his possession either the rooms or the goods would result in a fight. His taking the pistol with him shows that it was his purpose to bring that fight to a conclusion in his favor, even if he had to kill his antagonist. On this statement of the case we are not prepared to say that the killing was done "upon a sudden quarrel or heat of passion." Nor can we say as a matter of law that there was no evidence of the "abandoned and malignant heart" constituting one of the elements of murder in the second degree. (See *People v. Emerson*, 130 Cal. 563, [62 Pac. 1069].)

The wife of the defendant was called as a witness by the defense, and the court permitted the district attorney to interrogate her as to statements made by her to H. H. Appel,

Esq., an attorney, at a time when she was endeavoring to retain him as counsel for her husband. This for the purpose of laying grounds for impeachment. The court further permitted Appel to state what was said by the witness to him upon that occasion. There is no claim that Appel was ever employed or retained. On the contrary, the testimony shows that he declined to accept employment. Section 1881 of the Code of Civil Procedure (subd. 2) provides that "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." The court committed no error in admitting this testimony. The inhibition does not extend to communications between the attorney and persons having social or business relations with the client. Certainly not, when the statement did not purport to be conveyed to the attorney from the client, but, on the contrary, was the representation of a witness as to her knowledge of the transaction.

The charge of the court excepted to correctly states the law upon the subject to which it relates. Reading the whole charge, it is manifest that the word "may," and not "must," was employed, which is emphasized when we consider that the word "must" appears in brackets, with the notation following that "words in brackets were stricken out by the court."

Judgment and order affirmed.

Gray, P. J., and Smith, J., concurred.

[Crim. No. 3. Second Appellate District.—June 13, 1905.]

THE PEOPLE, Respondent, v. PHILLIP LEE, Appellant.

CRIMINAL LAW—IMPANELMENT OF JURY—EXCUSE OF QUALIFIED JURORS BY COURT.—The court did not err in excusing a juror who had been examined from sitting on the panel in a criminal case, over the objection of the defendant thereto.

Id.—CHALLENGE TO PANEL—DENIAL WITHOUT PERMITTING PROOF—CURE OF ERROR.—It was error to deny a challenge of the defendant to the panel of jurors without permitting him to prove the facts

upon which the challenge was made; but such error was cured by a subsequent offer to allow an opportunity to make the proof, of which the defendant declined to avail himself.

ID.—MODE OF IMPANELMENT.—Where several jurors have been accepted and sworn, and the panel has been filled with talesmen, it was not error, when one of them has been excused for cause, to call another in his place without first examining the remaining talesmen, and to continue such course, where the right of the defendant to exercise of peremptory challenges was reserved until the panel was completed.

ID.—MURDER—EVIDENCE—DECLARATION OF DEFENDANT—RES GESTAE—REBUTTAL BY PROSECUTION.—Upon a trial for murder, where the declaration of the defendant to the deceased that he was a peace officer, and requiring him to hold up his hands, was proved by the testimony of witnesses, and was part of the *res gestae*, the prosecution had the right to rebut the declaration by proof that the defendant was not a peace officer.

ID.—PRESUMPTION OF GOOD CHARACTER—AID OF PRESUMPTION OF INNOCENCE—REFUSAL OF INSTRUCTION—PROOF.—A requested instruction that the defendant is presumed to be of good character for peace and quiet, and that such presumption is a fact in the case in aid of the presumption of innocence to be considered in determining whether the defendant is guilty, was properly refused. Any fact of good character greater than the presumption of innocence can only appear by evidence, which the prosecution, upon its admission, will be allowed to contradict; and any presumption against bad character is included in the presumption of innocence.

ID.—JUSTIFICATION OF HOMICIDE—REQUESTED INSTRUCTION INAPPLICABLE TO EVIDENCE.—A requested instruction as to a theory of justification of the homicide which was inapplicable to the evidence was properly refused.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

F. H. Thompson, and Byron Waters, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

SMITH, J.—The defendant was convicted in the lower court of murder in the second degree and sentenced to imprisonment in the state prison for thirty years. He appeals from the judgment and from an order denying a new trial.

Several points are urged for reversal, which will be considered in the order stated in appellant's brief. The first of these is, that the court erred in excusing, over the objection of defendant, one of the jurors examined who was in fact not disqualified. But this point has been determined adversely to the defendant by the decision in *People v. Arceo*, 32 Cal. 40. and several later cases affirming that decision.

The next point is, that the court erred in denying the defendant's challenge to the panel of jurors without permitting, or at least without waiting for, him to prove the facts upon which his challenge was made. This doubtless was error. But it seems to have been the result of a misunderstanding upon the part of the court as to the defendant's offer to prove the facts; and on the next day, when the court's attention was directed to the error, it offered the defendant opportunity to make the proof; which the defendant declined to avail himself of. The effect of the proof, if made, would have been to set aside the panel, and thus to give to the defendant all the advantage he would have had had he been allowed to make the proof in the first place. He was therefore in no way injured.

Another point is an alleged departure from the method prescribed by the provisions of the code for the impaneling of a jury. Eight jurors had been accepted and sworn to try the case, and, the original twelve having been disposed of, four others were drawn from the box by the clerk. Of these one was challenged for cause and the challenge allowed, and the court ordered the name of another juror to be drawn from the box, over the defendant's objection; who insisted that the remaining three should be first examined before a new name was drawn. And the same ruling occurred with reference to one or more of the other jurymen. But this was not in conflict with the provisions of the codes governing the subject. It is indeed provided by section 1068 of the Penal Code that the challenges of the defendant, both peremptory and for cause, "must be taken when the juror appears, and before he is sworn to try the cause"; and under this provision it was competent for the court to require the defendant to exercise his right of challenge, both peremptory and for cause, as to each juror immediately upon his appearance. (*People v. Scoggins*, 37 Cal. 679.) And had this course been

pursued the defendant would have been entitled, upon the rejection of a juror, to have the panel filled before he was called upon to use his peremptory challenges. But all that is required by the provisions of the section cited is, that the panel shall be completed before the defendant be required to exercise any of his peremptory challenges, and it appears that this privilege was allowed him.

Another error complained of is in the admission of the testimony of certain witnesses. It appears from the testimony of several witnesses that the defendant at the commencement of the affair which resulted in the homicide ordered the deceased to throw up his hands, saying that he was a peace officer, and the prosecution was permitted to prove by several witnesses that the defendant was not what he claimed to be. But the declaration of the defendant, being part of the *res gestae*, was evidence in the case, and it was therefore competent for the prosecution to controvert it.

The other point relates to two instructions asked by the defendant, but refused by the court, the first of which was as follows: "The court instructs you: That the defendant is by law presumed to be a man of *good* character for peace and quiet in the absence of any evidence to the contrary. Such presumption of good character, coming as it does in aid of a general presumption of innocence, is no more to be left out by the jury in their deliberation than the original presumption of innocence which the law gives it. The good character of the defendant, which the law presumes, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish the defendant's innocence, and it is not to be put aside by the jury in order to ascertain if the other facts and circumstances considered by themselves do not establish his guilt beyond a reasonable doubt, but his good character must be considered by you in determining whether or not the defendant is guilty. And after considering such presumptions of good character, together with all the other evidence in the case, if the jury entertain a reasonable doubt as to the guilt of the defendant, you must give him the benefit of such doubt and acquit him."

This instruction we think was rightly refused. It has, indeed, been said that "the law assumes that a defendant who is upon trial for an offense has a fair character," or reputa-

tion, and "he is entitled to the benefit of this presumption in their consideration of the weight to be given to the testimony bearing upon his guilt." (*People v. Gleason*, 122 Cal. 371, [55 Pac. 123].) But the presumption, we think, amounts to nothing more than that the character or reputation of the party is not bad, and if any inference may be drawn from the fact thus presumed, it is contained in and much more strongly supported by the legal presumption of the defendant's innocence until evidence to the contrary may appear. This is something very different from a presumption that the party accused is of "good" character; or to justify the assumption that the defendant was of such character as to justify a higher probability of his innocence of the crime than would result from the general presumption of his innocence. This fact can only appear by evidence, which the prosecution will, upon its admission, be allowed to contradict. (*Danner v. State*, 54 Ala. 127, [25 Am. Rep. 662].) The instructions given as to the legal presumption of innocence were sufficient on the subject of presumptions. (*People v. Johnson*, 61 Cal. 142.)

The other instruction, so far as material, was as follows: "If you believe from the evidence that the defendant acting as a reasonable man believed that the deceased, when he came to the hotel, was armed with a revolver; and that he came to the hotel with the intention to either kill or commit a violent assault upon Mrs. Hurlburt, it was not only the defendant's right, but it was his duty as a law-abiding citizen to intercept the deceased and prevent him if possible from carrying out his intentions, and the defendant would be justified in using all means which appeared to him as a reasonable man to be necessary to make his resistance and interference effectual."

As explanatory of this point a brief review of the evidence will be necessary. The homicide took place on the 2d of February, 1904, at a place called the Berwick Hotel, in the city of Los Angeles. The deceased had been ejected from the premises by the defendant at the request of the landlady during the preceding night; and there is much evidence to the effect that he sought to borrow a pistol from several parties for the purpose of going back to the place and killing the defendant. It also appears that a short time before the killing he did obtain a pistol, with which he returned to the

house; and which was found upon his person after his death. The evidence relied upon to support the instruction is that of Mrs. Hurlburt, the daughter of the landlady, who testified in effect that at some time before the deceased came to the house upon the occasion of his death (what time does not appear), the deceased came to the house, and upon meeting her threw up his gun and said, "I will kill you"; and that after his departure she told her mother and the defendant about his drawing a gun on her and threatening to kill her. When the deceased came again she saw him at the top of the stairs, and he said, "Come here, Alice, come here," and motioned to her, and she said, "No, Jack, I am afraid." Upon which, she says, the deceased put his hand back to his right-hand pocket and said, "Oh, I don't know as I will or not"; and then she looked upstairs and said, "Lee,"—referring to the defendant. Thereupon Lee came downstairs, and told deceased to throw up his hands; and he would not do it. The defendant then attacked the deceased, but was separated, and again attacking him was again separated, but renewed the attack and the homicide occurred. It is fair to defendant to say that the evidence tended very strongly to show that when the defendant used his pistol the deceased was about to resort to his, or at least that the circumstances were such as to justify the defendant in so believing. But the jury found otherwise, and no point is made as to the sufficiency of the evidence to justify the verdict of murder. We have, therefore, to consider only whether the evidence was sufficient to support the theory embodied in the instruction; and on this point we are of the opinion that there is nothing in the testimony to indicate that Mrs. Hurlburt was in any danger of attack from the deceased, or to produce such an impression upon the mind of the defendant. On the contrary, the case seems to be one of an ordinary fight between two men of violent temper.

We are of the opinion, therefore, that the judgment must be affirmed, and it is so ordered.

Allen, J., and Gray, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 11, 1905. Smith, J., dissenting.

[Nos. 8 and 9. Second Appellate District.—June 14, 1905.]

COUNTY OF SAN LUIS OBISPO, Respondent, v. MANUEL MACHADO SIMAS et al., Appellants.

EMINENT DOMAIN—PUBLIC ROAD—ACTION BY COUNTY—PLEADING—PROOF—MANNER OF CONSTRUCTION.—In an action by a county to condemn land for a public road it is not necessary either to plead or to prove the manner in which it is proposed to construct the road.

ID.—QUALIFICATIONS OF PETITIONERS FOR ROAD—SUFFICIENCY OF COMPLAINT.—Where the complaint shows that ten of the petitioners for the road are freeholders who will be accommodated by the road, and that two of them are residents of the road district, who are taxable therein for road purposes, it properly states the qualifications of the petitioners within the terms and meaning of section 2681 of the Political Code.

ID.—INTERMEDIATE ORDERS OF SUPERVISORS—REVIEW—COLLATERAL ATTACK—DISREGARD BY COURT.—None of the intermediate orders or proceedings of the supervisors between the filing of the petition and bond and the order to the district attorney are reviewable or subject to collateral attack in the action to condemn land for the road; but they must be disregarded by the court under section 2690 of the Political Code.

ID.—JUDGMENT ON PLEADINGS—NONSUIT—WAIVER OF NOTICE—APPEARANCE.—Where the complaint was sufficient, in containing all of the matters required by section 1244 of the Code of Civil Procedure, and where all of its averments were proved and found, except notice of the time and place fixed by the board for hearing the report, which, however, is shown to have been waived by appearance of appellants thereat and their participation therein, their motions for judgment on the pleadings and for a nonsuit were properly denied.

ID.—ORDER SETTING APART FUNDS BY TREASURER NOT ESSENTIAL.—An order of the board requiring the treasurer to set apart funds sufficient to satisfy the award is not material under section 2690 of the Political Code, and its obedience is not essential in determining jurisdiction, though the record sufficiently shows a compliance with such order.

ID.—VALIDITY OF DECREE—ABSENCE OF HEARING—RECITAL IN ORDER FILED—PAYMENT INTO COURT—ERROR NOT PREJUDICIAL.—The final decree is not void, though erroneous, for want of an opportunity and notice of hearing; and such error is not prejudicial where the order filed with the clerk recites that it was made in court, and previous payment of the money into court, the only fact necessary to be established at the hearing, is conceded in the bill of exceptions.

ID.—ORDER FOR POSSESSION—PENDENCY OF APPEAL—AMENDMENT OF CODE.—Since the amendment to section 1254 of the Code of Civil Procedure, an order for possession after payment of the money into court may be made pending an appeal from the decree of condemnation; and it was not error to refuse to permit proof of the appeal in making the order.

ID.—CONDEMNATION OF SEPARATE PARCELS—ORDER REFUSING SEPARATE TRIALS—DISCRETION OF COURT.—Under section 1244 of the Code of Civil Procedure, where separate parcels lying in the county are sought to be condemned by the county for a public road, the court has discretion to grant or refuse separate trials; and an order refusing separate trials will not be reviewed where no abuse of discretion appears.

ID.—TRIAL WITHOUT SEPARATION—PEREMPTORY CHALLENGES.—The trial having been ordered to proceed without separation, the right of the defendants to peremptory challenges was limited to four, in which all defendants must join.

ID.—VIEW OF LAND BY JURY—CONSENT OF ONE JOINT OWNER—ACQUIESCENCE IN ABSENCE OF JUDGE.—Where one of two joint owners of a tract representing the tract at the trial, in the absence of the other owner, consented to a view thereof by the jury, and made no objection to the statement of the judge that he would not attend the view, and did not formally request such attendance, there was no prejudicial error in the absence of the judge from the view. The acquiescence of such joint owner in the action of the court was in the exercise of a right or privilege he had to have such view, if no injury is shown to have resulted to the absent owner from the order.

ID.—INSANITY OF ABSENT OWNER—OFFER OF PROOF AFTER VERDICT—FINDINGS AND JUDGMENT.—The rights of the parties are to be determined as they existed at the time of the submission of the cause to the jury; and after such submission and the verdict of the jury an offer to prove that the absent owner was insane cannot constitute an objection to the signing and filing of findings and judgment and the entry of judgment.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from a final order of condemnation, and from an order staying proceedings and letting plaintiff into possession, and separate appeal from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

F. A. Dorn, and William Shipsey, for Appellants.

The defendants, owning several tracts, were entitled to separate trials on the question of damages to each separate

tract. (Code Civ. Proc., sec. 1244, subd. 5; 19 Ency. of Plead. & Prac., 536; *Judson v. Malloy*, 40 Cal. 299; *Clay County Land Co. v. Wood*, 71 Tex. 460, 9 S. W. 340.) Each party owner of several tracts was entitled to four peremptory challenges. (Code Civ. Proc., sec. 601; 12 Ency. of Plead. & Prac., 483, 484; *Stroh v. Hinchman*, 37 Mich. 490; *Hargrave v. Vaughn*, 82 Tex. 348, 18 S. W. 695; *Hundhausen v. Atkins*, 36 Wis. 518; *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. Ct. 909.)

W. H. Spencer, for Respondent.

The court had the right to join all parties whose lands were sought to be condemned by the road. (Code Civ. Proc., sec. 1244, subd. 5.) Defendants were expressly limited to four peremptory challenges. (Code Civ. Proc., sec. 601.) Defendants having appeared before the supervisors, waived notice, and cannot object to the absence. (*Kimball v. Board of Supervisors*, 46 Cal. 19.) The court was not required to attend the jury. (*Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870; *Hays v. Territory*, 7 Okla. 15, 54 Pac. 300; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331.)

ALLEN, J.—Plaintiff and respondent had judgment, final order of condemnation, and order letting into possession in this proceeding, brought by the district attorney of San Luis Obispo County, under direction of the board of supervisors, as provided by section 2690 of the Political Code, to condemn a right of way for a public road which such board had theretofore determined should be laid out and opened over the lands of defendants and other persons not parties to this action. Defendants appeal from the judgment upon the judgment-roll, from the final order of condemnation upon a bill of exceptions, and from the order staying proceedings and letting plaintiff into possession upon a bill of exceptions; and, in case No. 9, from the order of the court denying a new trial.

The entire record in all of the appeals discloses that defendant McKeen owned a tract of land adjoining a tract owned by defendants Simas and Lawrence; that the center line of the proposed road was the dividing line between said

tracts; that the said proposed road continued over lands of the Rice estate, not parties to this action; that after the verdict and judgment, and upon payment into court of the condemnation money, the trial judge, in his chambers adjoining the courtroom, an open door connecting the two, without previous notice being given to defendants of the motion to apply for final order of condemnation, signed such final order, which was immediately filed by the clerk in his office and duly entered; that after such final order was so entered, notice of appeal was given, and a bond for three hundred dollars approved and filed; that thereafter the court, on regular motion, made its order letting plaintiff into possession; that during the progress of the trial defendant Lawrence absented himself therefrom, and no reason therefor being made to appear by proper showing, the court proceeded with the trial. At the conclusion of the oral testimony an order was made permitting the jury to view the premises the subject of litigation under charge of an officer; that upon making such order the court announced that it would not attend such view, and did not. The defendants other than Lawrence consented to such order and action of the court. The attorney for Lawrence, being also the attorney for defendant Simas, objected and excepted on Lawrence's behalf alone to such order and action of the court.

Upon the appeal from the judgment it is urged that the court erred in overruling defendants' demurrer to the complaint, which is claimed to be insufficient in that it did not specify the manner in which plaintiff proposed to construct the road; and upon the appeal from the order denying a new trial error is claimed because the court refused to require plaintiff to state to the jury the manner in which the improvement was proposed to be made. Section 1244 of the Code of Civil Procedure, which undertakes to state what such a complaint shall contain, does not specify this requirement. The proceeding being only for the purpose of acquiring a right of way for a public road, the mere taking of the property, the damage to the remainder by severance alone, questions as to the damage to abutting property on account of subsequent improvement by establishing grades, or otherwise, are matters for determination when such damage is inflicted. To hold otherwise would be to say that before condemnation the supervisors must determine in advance the grades and the

manner of improving all public roads as a condition precedent to condemnation, which we do not think is authorized.

Upon these appeals it is further claimed that the complaint was insufficient to state a cause of action, or to authorize the introduction of testimony, because the complaint did not show that the petitioners for the road possessed the proper qualifications under the statute. The qualifications of the petitioners are determined by section 2681 of the Political Code. This section provides that "Any ten freeholders who will be accommodated by the proposed road, two of whom must be residents of the road district wherein any part of the proposed road is situated, and who are taxable therein for road purposes, may petition," etc. It affirmatively appears from the complaint that ten of the petitioners are freeholders who will be accommodated by the road; that two are residents of the road district, who are taxable therein for road purposes. This, in our opinion, complies with the requirement of the section. The contention of appellants is, that, properly construed and read, the section referred to contemplated that the ten freeholders should be taxable in the district for road purposes. If we are to say that the words "who are taxable therein for road purposes" relate to the ten freeholders, then we have a sentence reading: "Ten freeholders who will be accommodated by the road, who are taxable therein for road purposes." This would be meaningless, as it is the district within which the person should be taxable and not the proposed road. That portion of the sentence referring to the two residents cannot be read as a parenthetical clause for the reason above stated. Without such reading, the section must be construed as requiring only two residents of the district taxable for road purposes and the remainder freeholders only.

Various objections and exceptions are made with reference to the complaint and the rulings of the court upon the admissibility of testimony, based upon the theory that the various orders of the board of supervisors made intermediate the filing of the petition and bond and the order to the district attorney, were without jurisdiction and irregular. None of the intermediate orders or proceedings are reviewable in this action. Section 2690 of the Political Code, authorizing this action, provides that such suit shall be determined by the court or jury in accordance with the rights of

the respective parties as shown in court, independent of said proceedings before the board. Here, then, is a legislative direction to the court to disregard the intermediate proceedings above referred to. In addition, such orders and proceedings are to be recognized as a final judgment in another proceeding before a competent tribunal and not subject to collateral attack. (*County of Sutter v. Tisdale*, 136 Cal. 476, [69 Pac. 141].)

Exceptions are urged to the action of the court in refusing judgment upon the pleadings and in denying the motion for a nonsuit. The complaint contains all of the matters required by section 1244 of the Code of Civil Procedure, which section is found in the title and part of the Code of Civil Procedure which by section 2690 of the Political Code is made the procedure in this class of cases. The complaint was sufficient, and the court having found all of the allegations to be true, except that no notice was given to non-consenting landowners, the motion for judgment on the pleadings was properly denied. The exception above noted, if in any sense material, loses its significance when the record discloses that all of the parties to this appeal appeared at the time and place fixed by the board for hearing the report and participated therein. This was a waiver of notice. (*Kimball v. Board of Supervisors*, 46 Cal. 19.) Under former statutes it has been held that setting apart by the treasurer of funds sufficient to satisfy the award of the viewers was necessary to entitle plaintiff to condemn; but under existing statutes (Pol. Code, sec. 2690) the court must disregard all orders before the board. If an order of the board, therefore, is not material, certainly its obedience would not be essential in determining jurisdiction, even had the legislature required the treasurer to sequester and hold funds, which does not appear in the present law affecting this procedure. There is sufficient, however, in the record to show that when the order was made a sufficient amount was in the road district fund to cover these damages, and that the same was held by the treasurer a proper length of time for that particular use.

It is next urged that the final decree of condemnation is void, because made without proof, without a hearing, without knowledge of defendants, without a bond, and not in court. The court having jurisdiction of the action, possessed all

power to hear without determining, or to determine without hearing. (*Ex parte Bennett*, 44 Cal. 88.) If the determination, with or without a hearing, be not justified, it is error only. (*Sherer v. Superior Court*, 96 Cal. 654, [31 Pac. 565].) Under our constitution the superior court is always in session. (Const., art. VI, sec. 5; *Falltrick v. Sullivan*, 119 Cal. 616, [51 Pac. 947].) The signing of the order under the circumstances of this case was in open court, as recited by the order itself. It became the order of the court and effective as such when filed with the clerk. (*Comstock etc. Co. v. Superior Court*, 57 Cal. 625; *Walter v. Merced Academy Assn.*, 126 Cal. 586, [59 Pac. 136].) The authority to make such order depended upon proof that the money had been paid into court, or to the clerk, which is its equivalent. To make such an order without notice and opportunity to defendants to be heard was error; but the only fact necessary to be established upon a hearing,—namely, payment,—being conceded by the bill of exceptions, there was no prejudicial error in making the order. No bond is required before making such final order, other than in those cases named in subdivision 5 of section 1248 of the Code of Civil Procedure, of which this is not one.

The right of the court to make the order letting plaintiff into possession pending the appeal is denied. When the money was paid into court it was so paid for the owner, as is required by the constitution. (*Spring Valley Water Works v. Drinkhouse*, 95 Cal. 222, [30 Pac. 218].) Its amount had been determined by a valid judgment which had been fully executed. (*Steinhart v. Superior Court*, 137 Cal. 578, [92 Am. St. Rep. 183, 70 Pac. 629].) In the case of *City of Los Angeles v. Pomeroy*, 132 Cal. 341, [64 Pac. 477], the appeal was taken before payment or final order. Since that decision was made section 1254 of the Code of Civil Procedure has been so amended that as now in force it must be taken as creating an addition to the class of cases theretofore constituting exceptions to the general stay of proceedings provided for in section 941 of the Code of Civil Procedure. There was no error, therefore, in making the order or in refusing to permit proof of the appeal.

It is urged on this appeal from the motion denying a new trial that the court erred in denying defendants' application

for separate trials and in the refusal of each of defendants' four peremptory challenges. Section 1244 of the Code of Civil Procedure, which controls the procedure in cases of this character, provides (subd. 5): "All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties." The discretionary power as to separation being vested in the trial court, and no abuse being apparent, its order will not be reviewed. The reason for the suggestions made in *Judson v. Malloy*, 40 Cal. 299, are not shown to exist in this case. The trial having been ordered to proceed without separation the right to peremptory challenges was restricted to four, in which all defendants must join. (Code Civ. Proc., sec. 601.)

There was no error in giving or refusing any of the instructions complained of.

The failure of the court to accompany the jury upon the view is claimed, on behalf of defendant Lawrence alone, as error. The record discloses that Simas and Lawrence were joint owners of the tract; that the latter absented himself from the trial; that at the conclusion of the testimony Simas, one of the joint owners, consented to the view and made no objection to the statement of the court that the judge would not attend the view. No formal request was made for the judge to attend. We perceive no prejudicial error in this failure of the judge to attend the view, whatever may be the effect of a view under section 610 of the Code of Civil Procedure, as to whether or not evidence is necessarily taken on account thereof. It appears that Simas and Lawrence, as joint owners, of necessity were affected alike by the verdict and judgment. By reason of Lawrence's absence the responsibility for the management of their joint defense devolved upon Simas; he acquiesced in the action of the court, and such acquiescence was in exercise of a right or privilege he had to have such view, and no injury is shown to Lawrence as a result of the order.

It is finally urged that the court erred in signing the findings and judgment after counsel for defendant Lawrence had requested time within which to make proof of Lawrence's insanity. The cause had been tried and submitted and ver-

dict returned. The rights of the parties are to be determined as they existed at the time of such submission. (*Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 481, [41 Pac. 328].) Neither party is entitled to have notice or to be present at the signing and filing of findings. (*Hathaway v. Ryan*, 35 Cal. 188.) Even in the event of death after verdict or decision, judgment may be entered. (Code Civ. Proc., sec. 669; *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 481, [41 Pac. 328].)

We find no prejudicial error in the record, and the judgment and orders are affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 87. Second Appellate District.—June 15, 1905.]

C. C. VALLE, Appellant, v. E. E. SHAFFER, Auditor of San Diego County, Respondent.

COUNTIES—POWER OF SUPERVISORS—APPORTIONMENT AND COMPENSATION OF HEALTH OFFICER—CONSTITUTIONAL LAW.—Under section 11 of article XI of the constitution and under the general provisions of the County Government Act of 1897, the board of supervisors of a county have the power, by necessary implication, to appoint an expert medical employee as health officer, and to fix his compensation and order it paid out of the county treasury. It is immaterial whether or not the legislature transcended its powers under the constitution in the express provision of subdivision 20 of section 25 of the County Government Act upon that subject.

ID.—APPOINTEE NOT A COUNTY OFFICER.—The health officer appointed by the board is to be deemed an employee, and not a county officer.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

George H. P. Shaw, Lewis R. Kirby, and Kirby & Shaw, for Appellant.

Cassius Carter, District Attorney, and W. R. Andrews, Deputy, for Respondent.



GRAY, P. J.—The petitioner applied to the superior court for a writ of mandate to compel the auditor of San Diego County to draw his warrant in favor of petitioner on the county treasurer for fifty dollars claimed to be due petitioner for one month's salary as health officer of said county. A demurrer to the petition was sustained, and from the judgment following the petitioner appeals.

The board of supervisors of said county appointed petitioner health officer of said county and fixed his compensation at six hundred dollars a year, or fifty dollars a month. The question for solution relates to the validity of the orders of the said board in that behalf.

Section 11 of article XI of our constitution reads as follows: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The powers of a county "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." (Stats. 1897, p. 452.)

"The board of supervisors shall adopt orders and ordinances necessary for the preservation of the public health of the county, not in conflict with the general laws, and provide for the payment of all expense incurred in enforcing the same." (Stats. 1897, p. 464.)

Counties "are bodies corporate and politic, and as such have the powers specified in this act, and such other powers as are necessarily implied." (Stats. 1897, p. 452.)

The board also has power "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." (Stats. 1897, p. 467, subd. 40.)

The foregoing provisions of the constitution and of the County Government Act of 1897 by necessary implication, if not by express words, give to the board of supervisors of San Diego County the authority to do just what they have done in appointing and fixing the compensation of petitioner herein. How is the board to look after the sanitary condition of the county and the health of its people except through the assistance of paid expert agents? They have the implied power to adopt any adequate and appropriate means to carry

out their express powers. "Power to accomplish a certain result which evidently cannot be accomplished by the person or body to whom the power is granted without the employment of other agencies includes the implied power to employ such agencies; and in such case when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted." (*Harris v. Gibbins*, 114 Cal. 418, [46 Pac. 292].)

There can be no doubt about the constitutionality or propriety of any of the above-quoted provisions of the County Government Act of 1897 defining the powers of the board of supervisors. Indeed, as the legislative body of the county, they would, under the constitutional provision quoted, have by implication all the powers given, even if there was no express statute in relation thereto.

It is, then, immaterial whether the legislature transcended its powers under the constitution when it provided in subdivision 20 of section 25 of the County Government Act of 1897 (Stats. 1897, p. 464), for the appointment of a health officer in each of the counties and left it to the board to fix his compensation, without classifying the counties. If their effort in that behalf was constitutional, then, of course, the board had a right to follow it. If, on the other hand, it was unconstitutional and void, still the board might adopt it as the most reasonable method of exercising the implied power which we have already held them to possess under the provision of the constitution.

The board had the power to appoint an expert medical employee, just as in *Harris v. Gibbins*, 114 Cal. 418, [46 Pac. 292], it was held to have the inherent or implied power to employ an expert to examine books, or as it would have to employ a janitor or other necessary assistant. And this power is in no way affected by any abortive attempt of the legislature to *expressly* give them the same power by a method contravening some provision of our constitution.

Again, to put it in another way, if the act of the legislature is void because it fails to fix the compensation of the health officer, but leaves that matter to the board,—or is void for any other cause,—we can only say that the board is left without any *express* authority to appoint a suitable medical assistant, which throws them back again upon their *implied*

power to do that very thing. The board should not renounce so important a function as that of looking after the sanitary condition of the county because the legislature has failed in its duty to provide them with the necessary machinery to that end when they possess the power to supply their own machinery. Of course, their appointee is not a county officer, because he does not hold his position by the authority necessary to make him such. He is, however, if we assume the unconstitutionality of the act expressly providing for his appointment, the employee of the board and they have at the same time the implied power to say what his compensation shall be, and to order it paid out of the county treasury. Without the power to pay him they could not secure his services and would be helpless to perform the duties enjoined upon them.

The judgment is reversed and the court below directed to overrule the demurrer to the petition.

Smith, J., and Allen, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on August 14, 1905.

[No. 8. Second Appellate District.—June 16, 1905.]

E. W. LORING et al., Appellants, v. DUTCHESS INSURANCE COMPANY, Respondent.

FIRE INSURANCE—POLICY ISSUED UPON KNOWN FACTS—WAIVER OF INCONSISTENT CONDITIONS.—The issuance of a policy of fire insurance upon known facts waives all conditions inconsistent therewith.

ID.—APPLICATION BY HOLDER OF EQUITABLE TITLE—LEGAL TITLE HELD AS SECURITY—CONDITION AS TO OWNERSHIP IN FEE.—An applicant for fire insurance in the sum of eight hundred dollars by one who had paid the consideration for the insured property, but who had taken the title in the name of another as security for a loan of five hundred dollars, who stated the facts about the title and the relation of the parties thereto in his application for the policy, and asked for insurance in the name of the creditor, the loss, if any, to be paid to the applicant as his interest may appear, is not precluded from recovery by an expressed condition in the policy

that the applicant was the sole owner in fee of the property destroyed.

Id.—CONSTRUCTION OF POLICY—JOINDER OF PLAINTIFFS.—The policy having issued with knowledge that the owner of the legal title had a smaller interest than the amount insured, with a proviso that the loss should be payable to the applicant, must be construed as intended to secure the interest of both of them, and the policy ran to both, and they were entitled to join as plaintiffs in an action upon the policy.

Id.—CERTAINTY IN PLEADING—KNOWLEDGE OF FACTS.—Where the complaint avers that in the proofs of loss the interest of the creditor in the policy was disclosed, it shows with sufficient certainty that defendant was advised of the respective interests of the plaintiffs. Where it affirmatively appears that the facts are equally in possession of both parties, the rule is applicable that ambiguities and uncertainties should be viewed in the light of the situation of the parties as to their knowledge of the facts.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Mills & Hizar, for Appellants.

H. S. Utley, for Respondent.

ALLEN, J.—Action upon a policy of insurance. Defendant demurred to the second amended complaint on the grounds: 1. That it did not state facts sufficient to constitute a cause of action; 2. That there was a misjoinder of parties plaintiff; and 3. That the complaint was ambiguous in various particulars, among which was, that it could not be ascertained therefrom what were the interests of plaintiffs in the property insured. The demurrer was sustained, and upon plaintiffs' refusal to amend, judgment was entered for defendant. This appeal is from the judgment.

The facts stated in the second amended complaint, so far as material, are: That plaintiff Bunch, having paid the consideration price for certain premises upon which the insured buildings were situated, caused legal title to be taken in his co-plaintiff Loring as security for a loan of five hundred dollars and interest. Thereafter Bunch made application (a copy of which application appears in the complaint) to the agent of the defendant company for a policy of insurance to

the amount of eight hundred dollars upon such buildings, and in such application made known the state of title and the relation of the parties thereto, and directed the policy to be written in Loring's name, with the loss, if any, payable to Bunch as his interest may appear; all of which was done, Bunch paying to defendant the premium. In the policy, as appears by the copy made a part of the complaint, it was stipulated that it should be void if the interest of the insured should be other than unconditional and sole ownership. Loss, due proof thereof, and interests of plaintiff were averred.

It is insisted by defendant, in support of its general demurrer, that the actual condition of title as averred, when taken in connection with the averment that Bunch was the sole owner in fee of the property destroyed, precludes recovery. With this contention we do not agree. The issue of a policy upon known facts waives all conditions inconsistent therewith. (*Sharp v. Scottish Union etc. Ins. Co.*, 136 Cal. 542, [69 Pac. 253, 615]; *Allen v. Home Ins. Co.*, 133 Cal. 29, [65 Pac. 138].) Plaintiffs each had an insurable interest in the property. (Civ. Code, sec. 2546; *Davis v. Phoenix Ins. Co.*, 111 Cal. 414, [43 Pac. 1115].) The defendant, having been apprised of the fact that Loring's interest was small, and upon such information issuing a policy for eight hundred dollars and accepting a premium based on that amount, with a proviso that the loss should be payable to Bunch, can only lead to the conclusion that the interests of Bunch and Loring were both insured, and the policy ran to both. To construe the contract as insuring only Loring, would be to say that Bunch was paying a premium and the company accepting the same upon an amount which, in the very nature of things, was far in excess of possible loss. It follows that plaintiffs, both being beneficiaries, could join in the action. Even in cases where part is payable to the assured and part to others, all of the beneficiaries may unite as plaintiffs in the action. (*West Coast Lumber Co. v. State etc. Co.*, 98 Cal. 513, [33 Pac. 258].)

The complaint was neither ambiguous nor uncertain in its allegation with reference to Loring's interest. It avers that in the proof of loss this interest was disclosed. From this it appears that defendant was advised, therefore, of the respective interests. "Faults consisting in ambiguities and un-

certainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts." (*Schaake v. Eagle etc. Can Co.*, 135 Cal. 485, [63 Pac. 1025, 67 Pac. 759].) And the rule is proper in cases where it affirmatively appears that the facts are equally in possession of both parties.

We do not regard the complaint as ambiguous or uncertain in any of the other respects claimed. Enough appears in the complaint to render it easy of comprehension and free from reasonable doubt. (*Salmon v. Wilson*, 41 Cal. 602.)

Judgment is reversed, with directions to the court below to overrule the demurrer to the second amended complaint.

Gray, P. J., and Smith, J., concurred.

[No. 2. First Appellate District.—June 19, 1905.]

PEOPLE'S HOME SAVINGS BANK, Respondent, v. H. J. SADLER, Appellant; MINNIE C. SADLER et al., Executors, Substituted Appellants.

APPEAL—REVIEW CONFINED TO RECORD—RELATION OF DATE OF AFFIRMANCE.—In determining the correctness of a judgment appealed from, this court is limited to a consideration of the record thereof, and error of the trial court cannot be predicated by reason of any matter subsequent to its rendition. If the judgment is affirmed, it is as of the date of its rendition.

ID.—DEATH OF APPELLANT—SUBSTITUTION OF EXECUTORS—IMPROPER MOTION TO REMAND CAUSE.—Where the appellant has died pending the appeal, a motion by his substituted executors to remand the cause to the superior court upon the ground that the judgment is incapable of enforcement for want of presentation of it as a claim against the estate of the deceased appellant is improper and will be denied.

ID.—ENFORCEMENT OF JUDGMENT—PROVINCE OF COURT—PROBATE JURISDICTION.—The enforcement of the judgment or the right to withhold it is primarily within the jurisdiction of the court in which it was rendered. Upon the death of the appellant the power of the court to enforce the judgment by execution against him terminated, and the respondent is remitted for its collection to the probate jurisdiction having charge of appellant's estate, and to that court the executors must present any defense they may have to its payment from the assets of that estate.

BANK—TRANSFER OF SHARES—ASSUMPTION OF LIABILITY BY TRANSFEREE.—Upon the transfer of shares of stock in a bank and the acceptance of certificates issued therefor, the transferee assumes the liability to the bank for the unpaid amount thereof to which the original owners were subject.

Id.—BY-LAWS—GENERAL POWER OF BANK—INHERENT RIGHT—RESTRICTIONS—ENUMERATION OF POWERS NOT EXCLUSIVE.—A bank as a private corporation has a general power and inherent right incidental to its creation to enact by-laws for its internal government and to regulate the conduct, rights, and duties of its members, independently of legislative declaration, and subject only to legislative restrictions. The enumeration of powers to make by-laws contained in section 803 of the Civil Code does not restrict such general power and inherent right.

Id.—BY-LAW FOR ACTION UPON CALLS—CONTRACT—WAIVER OF ASSESSMENT.—A by-law providing for the enforcement of unpaid calls is within the general power of the bank, and a provision for enforcement thereof by action binds all consenting stockholders; and where all of the stockholders agreed to the by-laws by signature thereto, such contract is a waiver of the right to insist that the corporation shall levy assessments therefor, as provided in the Civil Code, and may be enforced by the bank according to its terms.

Id.—CONSIDERATION OF CONTRACT BY TRANSFEREE.—The admission of a transferee of stock to the privileges of a member of the corporation, with the right to participate in its proceedings and to receive dividends upon his shares of stock, is a sufficient consideration for the agreement with the corporation by signature to its by-laws.

Id.—PROVISION FOR LIEN UPON STOCK—FORECLOSURE NOT REQUIRED.—A provision in the by-laws giving the bank a lien upon the stock for unpaid calls does not create a mortgage requiring foreclosure under section 726 of the Code of Civil Procedure; and the bank may enforce the payment of the indebtedness by action without any foreclosure of the lien.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

Fred H. Hood, C. S. Farquar, and Barnes & Hood, for Appellant.

Stratton & Kaufman, for Respondent.

HARRISON, P. J.—The plaintiff is a corporation organized under the laws of this state, and the appellant is a stock-

holder therein holding forty shares of its capital stock of the par value of one hundred dollars, on each of which there has been paid to the plaintiff the sum of thirty-three and one-third dollars and no more. The present action was brought to recover from him the sum of sixty-six and two-thirds dollars remaining unpaid upon each of said shares. Judgment was rendered in favor of the plaintiff for \$2,666.67 and interest, from which the defendant has appealed, bringing the appeal here upon the judgment-roll, including a bill of exceptions.

The articles of incorporation of the plaintiff, in which five directors were named, were signed and acknowledged May 11, 1888, setting forth the amount of its capital stock to be three hundred thousand dollars, divided into three thousand shares of the par value of one hundred dollars each, and showing that all of it had been subscribed, and that each of the said directors had subscribed for six hundred shares. The certificate of incorporation was issued by the secretary of state May 14, 1888. On May 17, 1888, the aforesaid subscribers for the capital stock, without a meeting having been called for that purpose, assented to in writing, and adopted a code of by-laws for the corporation, and on the same day an entry of that fact was made in the minutes of the directors' meeting. On May 18th these by-laws, duly certified by a majority of the directors and the secretary of the corporation, were copied into a book kept by the corporation and thereafter known as the "Book of By-Laws." Following them there was written in the book and signed by the stockholders the following: "We the undersigned stockholders of the People's Home Savings Bank, a corporation, do hereby agree to the provisions contained in the foregoing by-laws and in such amendments to the said by-laws as may hereafter be adopted, and we agree to obey all the provisions contained therein as aforesaid in every respect." Article IX of these by-laws is as follows: "The board of directors of said corporation shall, at their first meeting, after the adoption of these by-laws, call in thirty-three and one-third per cent of the capital stock thereof, and may issue certificates for such stock under such restrictions as are provided in these by-laws, signed by the secretary and president, or in his absence by the vice-president, and the remaining sixty-six and two-thirds per cent of

said capital stock shall be subject to the call of the board of directors to be made at any time; whenever the remaining sixty-six and two-thirds per cent of said capital stock, or any part thereof, shall be called by the board of directors it shall be immediately paid by the stockholders, and any amount not so paid by any stockholder shall be a debt due to the corporation, and the corporation shall have the right to immediately commence suit therefor in any of the courts of this state, and shall have a lien on the stock owned by any stockholder for the amount so due." On May 18, 1888, five certificates for six hundred shares each of said capital stock were issued to the aforesaid subscribers, upon the back of each of which the aforesaid article IX was printed at length and in full, and the said by-law has since been printed on the back of each certificate of stock issued by the plaintiff.

April 3, 1889, the defendant became the owner by transfer from J. K. Wilson, one of the aforesaid subscribers, of ten shares of the said capital stock, and on that day the plaintiff issued to him a certificate for said ten shares, for which he gave and signed the following receipt: "Received the above certificate subject to the articles of incorporation and by-laws of the corporation," and at the same time subscribed his name to the by-laws copied in the aforesaid book. The capital stock of the plaintiff was thereafter increased from three hundred thousand dollars to one million dollars, divided into ten thousand shares of the par value of one hundred dollars each, and certificates issued to the subscribers therefor, and on June 13, 1890, the defendant became the owner by transfer of thirty of said shares, for which certificates were issued to him by the plaintiff, upon the face of each of which was printed the words "This stock is one-third paid up." After receiving these certificates the defendant attended the stockholders' meetings of the plaintiff, and at said meetings voted the said forty shares, and from time to time received dividends thereon, six in all.

In 1894 the plaintiff became insolvent, and on January 20, 1895, went into liquidation under the provisions of section 11 of the Bank Commissioners' Act as amended in 1887 (Stats. 1887, p. 91); and on August 28, 1895, the bank commissioners directed the directors of plaintiff to levy an assessment for the full amount of its unpaid capital stock. In obedience to

this direction the said directors passed a resolution September 30, 1895, calling in the unpaid two thirds of the capital stock, and requiring each stockholder to immediately pay to the corporation at its office the sum of sixty-six and two thirds dollars upon each share of its stock held by such stockholder. Notice of this resolution was published as directed by the board of directors, and a copy thereof, together with a demand in accordance therewith for the full amount due from them respectively, was duly served upon the several stockholders. The defendant not having complied with this demand the plaintiff brought the present action.

1. The judgment against the defendant was entered in the superior court March 21, 1899, and the appeal therefrom was taken May 20, 1899. The appellant died April 14, 1901; and upon proof that the executors of his will had been substituted by the superior court as defendants in his place, an order was made herein continuing the appeal against them. When the appeal came on for hearing counsel therefor objected to any further proceedings upon the ground that the judgment is incapable of enforcement by reason of the failure of the respondent to make proper presentation to the said executors of his claim against the estate of the appellant, and asked to introduce evidence establishing these facts; and also asked that upon such showing the court, without either affirming or reversing the judgment, would make an order remanding the cause to the superior court, with directions to take such course as would be proper in view of these facts.

This motion must be denied. The function of an appellate court is to review the action of the inferior court in rendering the judgment or making the order from which the appeal is taken. For this purpose a record of the proceedings before the inferior court and of the matters presented for its action is brought to the appellate court, and in determining the correctness of the judgment or order appealed from it is limited to a consideration of that record. If the judgment is affirmed such affirmance is as of the date at which it was rendered. If it is reversed the case stands as if no judgment had been rendered by the inferior court. It is therefore manifest that error on the part of the inferior court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrel-

evant for the appellate court to entertain any evidence of such subsequent matters.

The principle upon which this rule rests is not impaired by the fact that in certain exceptional instances the appellate court, upon a showing of matters occurring subsequent to the entry of the judgment, will decline to entertain the appeal or to consider its merits, as, for example, where the judgment has been satisfied of record by the voluntary act of the appellant (*People v. Burns*, 78 Cal. 645, [21 Pac. 540]; *Moore v. Morrison*, 130 Cal. 80, [62 Pac. 268]); or where the judgment was rendered upon a cause of action which did not survive, and by reason of the death of the appellant the cause of action has abated pending the appeal (*Estate of Bachelder*, 123 Cal. 466, [56 Pac. 97]); or where the statute by virtue of which the judgment was rendered has been repealed without any saving clause pending the appeal (*First National Bank v. Henderson*, 101 Cal. 307, [35 Pac. 899]); or where the inferior court has granted a new trial after the appeal from the judgment was taken, whereby the judgment was vacated (*Id.*); or where the parties to the appeal have entered into a stipulation which has the effect to render the appeal a mere moot question (*Illinois etc. Bank v. Pacific Railway Co.*, 115 Cal. 285, [47 Pac. 60]); or where, by reason of such subsequent occurrences, there would be no matter pending for action before the inferior court (*San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, [32 Pac. 517]; *Foster v. Smith*, 115 Cal. 611, [47 Pac. 591]). In all these cases the judgment appealed from had become inherently inoperative, and its affirmance or reversal would not affect the rights of the parties, or give to the lower court any function to perform in reference thereto.

The enforcement of a judgment or the right to withhold its enforcement is a matter primarily within the jurisdiction of the court by which it was rendered; and if the judgment appealed from herein should be affirmed, and there should be any reasons why the superior court should not enforce it, they must be presented to that court, and its action thereon can then be reviewed by the appellate tribunal. Upon the death of the defendant the power of that court to enforce its judgment by execution terminated, and the respondent was remitted for its collection to the probate jurisdiction of the court having charge of the administration of his estate, and to

that court the appellant must present any defense there may be to its payment out of the assets of that estate.

2. Under the facts set forth in the record it must be held that by the transfer to the appellant of the forty shares of the capital stock of the plaintiff, and his acceptance of the certificates issued to him therefor, he assumed the same liability to the corporation for the unpaid amount thereof that his assignors were under. (Civ. Code, sec. 1531, subd. 2; *Webster v. Upton*, 91 U. S. 65; *Visalia etc. Bank v. Hyde*, 110 Cal. 632, [52 Am. St. Rep. 136, 43 Pac. 10]; *Walter v. Merced Academy Assn.*, 126 Cal. 582, [59 Pac. 136].)

It is however contended by him that the plaintiff is not entitled to maintain the present action, for the reason that the above-quoted by-law is invalid, and in support thereof he relies upon the proposition that a corporation has only such power as is given it by the legislature, and that, as in section 303 of the Civil Code, the legislature has enumerated the subjects upon which a corporation may make by-laws, it has impliedly declared that it cannot make a by-law upon any other subject.

A by-law of a private corporation is a rule or law adopted by it for its internal government, and to regulate the conduct and prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs. Although the authority to enact such by-laws is frequently declared in the charter of the corporation, or by some general law, yet the authority to enact them does not depend upon such declaration, but is an inherent right which, in the absence of some positive legislative restriction, is incident to every corporation. The legislature may prescribe the formalities to be observed in their enactment, and may limit the scope and subjects for which they may be enacted; but in the absence of any restriction by the legislature, the propriety or character of the by-laws is to be determined by the corporation itself, subject, however, to the condition that they must be reasonable and not contravene or be inconsistent with its charter or any existing law of the state. Accordingly, the legislature of this state, in defining the inherent powers of a corporation in section 354 of the Civil Code, has declared that "Every corporation, as such, has power: . . . 6. To make by-laws, not inconsistent with

any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock." This declaration is general in its terms, and sufficiently comprehensive to include the right to enact the above-quoted by-law. By enumerating in section 303 of the Civil Code certain matters upon which corporations may enact by-laws the legislature has not limited the authority to make such by-laws which they would have as an incident inherent in their creation and irrespective of such legislation. (See *State v. Mayor*, 33 N. J. L. 57.) Similar provisions in the statutes of Massachusetts (Rev. Stats., ed. 1836, ch. 44, secs. 1, 2) were held by the supreme court of that state to be "not restrictive but directory." (*Davis v. Proprietors*, 8 Met. 321.)

The case of *Child v. Hudson Bay Co.*, 2 P. Wms. 207, cited by the appellant, is not inconsistent with this rule. The statement of Lord Macclesfield quoted therefrom, that "Where the charter gives the company a power to make by-laws they can only make them in such cases as they are enabled to do by the charter," is to be construed in connection with the facts in reference to which it was made. The company was empowered to make by-laws for its government, and for the management and direction of its trade to Hudson Bay, and it was held that it could not under this authority make by-laws in relation to insurance and other projects which parliament had declared to be illegal. That portion of the by-law, however, which declared that the company should have a first lien upon the stock of any member who should become indebted to it was declared valid; provided such debt was incurred in reference to the business for which the company was incorporated. (See Angell & Ames on Corporations, secs. 326, 356.) In the other case cited by the appellant (*Ireland v. Globe Milling Co.*, 19 R. I. 180, [61 Am. St. Rep. 756, 32 Atl. 921]) the court cited this case as authority for holding that a statute of Maine similar to section 303 of the Civil Code did not authorize the defendant to make the by-law therein involved, but in its opinion upon a subsequent hearing of the same case (21 R. I. 9, [79 Am. St. Rep. 769, 41 Atl. 258]) that court said that it did not question the proposition that a corporation could pass by-laws relative to the regulation of its affairs, although the statute gave no special authority therefor,

but held that the by-law in question was invalid for the reason that it attempted to interfere with private right in matters not pertaining to the business of the corporation.

Article IX aforesaid is moreover not only a by-law for the regulation of the affairs of the corporation, but it is also a contract between the parties signing the same on the one part and the corporation on the other, and may be enforced as such by the corporation. While provisions for regulating the rights of the members of a corporation as between themselves, duly adopted by a majority of the stockholders, may not be enforceable as a by-law upon non-consenting stockholders, yet, if assented to by all, they may be enforced as a contract. (*New England Trust Co. v. Abbott*, 162 Mass. 148 [38 N. E. 432]; *Angell & Ames on Corporations*, sec. 342; *Clarke & Marshall on Corporations*, sec. 642.) Subscribers for the stock of a corporation may agree among themselves to pay the amount of their subscription either in a single installment or in such sums and at such times as the same may be called for. Such a contract will be a waiver of their right to insist that the corporation shall levy assessments therefor as provided in the Civil Code, and may be enforced against them by the corporation according to its terms. (*West v. Crawford*, 80 Cal. 19, [21 Pac. 1123; *Marysville Electric Light Co. v. Johnson*, 93 Cal. 538, [27 Am. St. Rep. 215, 29 Pac. 126]; *Kohler v. Agassiz*, 99 Cal. 9, [33 Pac. 741].)

Upon the transfer to the appellant from the original subscribers of his forty shares of stock, and the issuance to him by the plaintiff of certificates therefor, on the back of each of which the above by-law was printed, he was informed of the condition upon which he became a stockholder, and of the extent and character of his ability for the unpaid portion of the capital stock. With full notice of the by-law, he acknowledged in writing that he had received the certificate subject thereto, and by also subscribing his name to the book of by-laws he thereby agreed to the provisions contained in them, and thereafter held the stock on the same conditions and subject to the same obligations as did his assignors. (*Visalia etc. R. R. Co. v. Hyde*, 110 Cal. 632, [52 Am. St. Rep. 136, 43 Pac. 10].) His admission to the privileges of a member of the corporation, with the right to participate in its proceedings and to receive dividends upon his shares of stock, was a suffi-

cient consideration for the agreement thus made by him with the corporation.

3. The appellant further contends that, assuming that he is under this liability to the plaintiff, the present action for a personal judgment against him cannot be maintained, but that under the provisions of section 726 of the Code of Civil Procedure, the only remedy of the plaintiff is for a foreclosure of its lien upon his shares of stock. The limitation upon the form of action which is declared in section 726 extends only to "mortgages," but the provision in the aforesaid by-law giving the corporation a lien upon the shares of a stockholder for the amount of the par value thereof which may be unpaid does not constitute a mortgage. A lien on personal property may exist in many forms other than by way of mortgage, and although every mortgage is a lien, it is not every lien that is a mortgage. The essential element of a mortgage is a transfer or conveyance of the mortgaged property from the mortgagor to the mortgagee; but the stockholder does not by virtue of this by-law transfer or convey any property to the corporation, but merely agrees that the corporation may have a lien upon his interest in its property as collateral security for his indebtedness to it. The corporation may enforce the payment of that indebtedness without any foreclosure of this lien. (*Sonoma Valley Bank v. Hill*, 59 Cal. 107.)

The judgment is affirmed.

Cooper, J., and Hall, J., concurred.

[No. 92. Third Appellate District.—June 20, 1905.]

In Re J. W. FINLEY, on Habeas Corpus.

CRIMINAL LAW—MALICIOUS ASSAULT WITH DEADLY WEAPON BY CONVICT FOR LIFE—DEATH PENALTY—CONSTITUTIONAL LAW.—Section 246 of the Penal Code, imposing the death penalty upon a person undergoing a life sentence in the state prison who, with malice aforethought, commits an assault upon the person of another with a deadly weapon, or by any means or force likely to produce bodily injury, is constitutional, and does not inflict any cruel or unusual punishment nor deny the equal protection of the law.

- Id.—DOUBTS RESOLVED IN FAVOR OF VALIDITY.**—No statute is to be declared unconstitutional unless its conflict with the constitution is clear, substantial, and incapable of reconciliation; and every presumption and intendment aids, and every doubt is to be resolved in favor of, the validity of the statute assailed.
- Id.—EXCEPTIONAL PENALTIES FOR EXCEPTIONAL CRIMES.**—The legislature may attach exceptional penalties to crimes which are exceptional in their nature or attended by exceptional circumstances.
- Id.—DEATH PENALTY NOT CRUEL NOR DISPROPORTIONATE TO OFFENSE.**—The death penalty is not cruel *per se*; and cannot be said to be disproportionate to the offense punished by section 246 of the Penal Code.
- Id.—EQUAL PROTECTION OF THE LAW—CLASSIFICATION.**—The equal protection of the law is not denied where there is a proper classification, and every one who stands in the same relation to the law is treated equally in the same manner under the same circumstances and conditions.

APPLICATION for Writ of Habeas Corpus to the Sheriff of Sacramento County.

The facts are stated in the opinion of the court.

Samuel T. Bush, H. C. Ross, and W. F. Renfro, *Amicus Curiae*, for Petitioner.

A. M. Seymour, District Attorney, for Respondent.

McLAUGHLIN, J.—Application for writ of *habeas corpus*.

The petitioner, while undergoing a life sentence in the state prison at Folsom, was indicted for the crime defined in section 246 of the Penal Code, and is now confined in the county jail of Sacramento County awaiting trial for said crime.

The section upon which the indictment is based reads as follows: "Every person undergoing a *life sentence* in a state prison of this state, who, *with malice aforethought*, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is *punishable with death*."

It is contended that the indictment is void and the restraint under it illegal, for the reason that section 246 contravenes sections 6, 11, and 13 of article I and subdivision 2 of section 25 of article IV of the constitution of the state, and the fifth, eighth, and fourteenth amendments to the constitution of the United States.

1. *Rules of construction.*

Questions involving the constitutionality of statutes always invite careful consideration of the relation between the legislative and judicial departments of government.

These departments are co-ordinate, and, being of equal rank, it follows, necessarily, that courts should never annul or impair an act of the legislature, unless it is plainly and palpably in conflict with that supreme law which limits and controls the exercise of power by all branches of government.

In a sense, the legislative is the highest department of state government. The few restrictions found in state and federal constitutions embrace the only limitations on its power; while the powers and duties of the other departments are limited not only by constitutions, but by legislative enactment.

These reflections admonish us that, while courts should fearlessly and conscientiously interpret laws, whether found in constitutions or statutes, such power of construction should be exercised with *extreme caution* when the validity of a statute is questioned. They also point to the reason for, and basis of rules, which command that no statute shall be declared violative of constitutional provisions, unless the conflict is clear, substantial, and incapable of reconciliation. In this way attention is directed to the principle underlying the doctrine that every presumption and intendment aids, and that every doubt must be resolved in favor of, the validity of the statute assailed. (Cooley on Constitutional Limitations, pp. 233, 235, 237, 240, 252, 253; Endlich on Interpretation of Statutes, sec. 178; Sutherland on Statutory Construction, sec. 82; Gillett's Criminal Law, sec. 26; *Brown v. Walker*, 161 U. S. 596, [16 Sup. Ct. 644]; *Booth v. Illinois*, 184 U. S. 431, [22 Sup. Ct. 425]; *Bourland v. Hildreth*, 26 Cal. 180; *University v. Bernard*, 57 Cal. 613; *People v. Hayne*, 83 Cal. 116, 117, [17 Am. St. Rep. 211]; *Bates v. Gregory*, 89 Cal. 394, [26 Pac. 891]; *In re Madera Irrigation Dist.*, 92 Cal. 307, 308, [27 Am. St. Rep. 106, 28 Pac. 272].)

These rules and principles force the conclusion that this court must be *entirely satisfied and convinced* that the legislature has abused its great discretionary power and overstepped constitutional limitations before we can be justified in declaring section 246 unconstitutional and void.

There is no room for conjecture or surmise, sympathy or deprecation. We are not privileged to discuss the wisdom or

advisability of this legislation, nor to indulge in speculation touching possible effects.

The question is purely one of law. Does this enactment subject the petitioner to cruel or unusual punishment? Is it special, discriminating, or unequal? Does it deny to him that equal protection which the law accords to all alike, be they exalted or lowly, saints or sinners? Upon the answers to these questions, the answer to the main question depends. These answers must be sought through the light of legal principles, and the investigation must be shorn of every vestige of prejudice or favor. It would be profitless to indulge in a homily touching the relations between the national and state governments, and quite as useless to sermonize on the point that some provisions of the higher constitution relied upon cannot be invoked to nullify or in any way affect the legislation of a sovereign state. The rules of construction as to both constitutions, so far as the question before us is concerned, are identical. Every point made by the petitioner is covered by provisions of our state organic law, and hence the validity of this statute will be tested by that standard. But, as federal questions are undoubtedly involved, due weight will be given to decisions by the federal courts.

2. Is the punishment cruel or unusual?

In considering this question the warm impulses of the heart must be stifled, for we are to remember that it is not pity for the culprit, nor resentment for his crime, but cold, dispassionate rules of law, which can lead us to an impartial and correct conclusion. Every human man feels a pitying regret whenever the death sentence has been, or may be, pronounced against a fellow-creature. But human experience, crystallized into law, teaches that very severe penalties are unfortunately necessary to deter men from defying law and daring the consequences. The function of defining crimes and fixing punishments has always been considered a matter of legislative discretion in the very broadest sense. For the judicial department to fix a nicely adjusted maximum or minimum scale for admeasuring penalties for crime would be as much an act of usurpation as if that department should attempt to enumerate the acts which would entail penal consequences. It is therefore for the legislature alone to define crimes and fix the punishment which may be inflicted. It is

only when the punishment is out of all proportion to the offense, and is beyond question an *extraordinary penalty* for a crime of *ordinary gravity committed under ordinary circumstances*, that courts may denounce it as *unusual*.

And a penalty can never be declared *cruel* unless it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment. It could hardly be contended that the death penalty is cruel *per se*, for the whole current of law for centuries justifies its infliction.

Hence we assume that the point here made is, that it is *excessive in degree*, and therefore inhibited.

This and other questions which are to follow seem to make this a case of first impression, for an industrious search by counsel, supplemented by an extensive and patient research by the court, has failed to disclose a parallel case. It is therefore of high importance that each proposition should be fully and clearly stated and decided, and this will, we trust, excuse any seeming verbosity.

It must be admitted that every person, *whether felon or freeman*, should be punished for making a deadly assault on another. This, then, suggests an inquiry as to the punishment which could be inflicted on a guilty life convict, if the judgment of death be not permissible.

Through his own misconduct, such convict has forever forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution.

The necessity for such punishment cannot be questioned. So sweet is liberty that men will do and dare anything to gain it. And when a man has forfeited that liberty, when the song of every bird and the breath of every zephyr tells the tantalizing story of privileges forever lost, desperation and despair makes the victim, especially if naturally depraved, a dangerous and daring man. Under such circumstances he will be careless of other lives and all consequences. It is then absolutely necessary that those who come in contact with him should be carefully protected against his reckless and certainly against his *malicious and deliberate acts*. But it was

urged in argument that such convicts can be punished by solitary confinement, a diet of bread and water, and other penalties now in use as part of prison discipline. The obvious answer to this is, that every convict, whatever his term, is subject to such penalties for *ordinary* infractions of prison rules. This is an incident attaching to the judgment already pronounced against him. But when a life convict commits an act amounting to far more than a mere infraction of disciplinary rules, an act denounced as a grave and dangerous crime in every criminal code, for us to declare that such penalties are the only ones that can be decreed as punishment for such act, would be to say with deliberate solemnity that the law not only tolerates but should *command* an idle act.

Such argument rebounds from reason back upon itself, and proves that such penalties, in addition to being ridiculously inadequate, would be no punishment at all.

And if such penalties *had* been declared in section 246, and *one* or *all* of them had been extended for any *definite term*, or to the *limit of imprisonment*, the same question here presented would still exist.

In that event counsel as industrious, astute, and ingenious would contend, under the same rules and authorities, that such punishment was of greater severity than could be meted out to other offenders, and was therefore excessive.

We could *then* decide only as we do *now*, that in view of the necessity for some adequate punishment, and the extraordinary circumstances surrounding the commission of this grave offense, the legislative discretion has not been abused, for the reason that within the domain of logic and law we can conceive of no other adequate penalty which could be inflicted.

We agree with counsel that the infliction of the death penalty in such cases is awful, and may add that its infliction in *any* case is likewise awful. But sentiment must give way to duty. Crime must be punished and prevented and lives must be protected; and while such arguments might properly be addressed to legislative discretion, they can have no weight here.

The legislature may attach exceptional penalties to crimes exceptional in their nature, or attended by exceptional circumstances, and this is such a case. Therefore, we can only bow to the mandate of that department, finding comfort in

the thought that life convicts, in common with other men, may escape penalties by behaving themselves.

We are, however, unwilling to rest a decision fraught with such grave import to a fellow-creature upon our own unsupported reasoning. In *Territory v. Ketcham*, 10 N. Mex. 718, [65 Pac. 169], the defendant had been convicted and sentenced to death under a statute making it a capital offense to "willfully and maliciously make an assault upon any railroad train, railroad cars, or railroad locomotives, for the purpose, and with the intent, to commit murder, robbery, or any other felony, upon or against any passenger on said train or cars, or upon or against any express messenger, mail agent, engineer, conductor, fireman, brakeman, or other employee of said trains," etc.

The validity of that statute was assailed upon the very grounds here urged; and the supreme court of New Mexico not only held the penalty within the discretion of the legislature, but went much further, saying: "The question whether the punishment is too severe and disproportionate to the offense is for the legislature to determine. . . . Counsel for defendant claims that, as properly understood, it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. . . . It was never designed to abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment of crime."

We deem it unnecessary to express either concurrence or dissent touching this extreme view, but invite attention to the many authorities cited to sustain the text, thus avoiding undue prolixity here.

A similar statute has been a law of this state for fourteen years, and, though two bitterly contested prosecutions were had under it, it stands unimpaired. If, as was said in the earliest of these cases, the "necessity of the times" justified such severe measures for "preventing train-wrecking and punishing train-wreckers," it is difficult to understand why the exigencies of a peculiar and dangerous situation would not justify equally severe measures, if necessary to restrain or punish hope-abandoned felons. (Pen. Code, sec. 218; *People v. Thompson*, 111 Cal. 245, [43 Pac. 748]; *People v. Wor-*

thington, 115 Cal. 245, [46 Pac. 1061]; *People v. Louren*, 119 Cal. 91, [51 Pac. 22, 639].)

In *People v. Williams*, 30 South. 337, the supreme court of Alabama held a statute nearly like ours constitutional. The only difference between that statute and the one under consideration is that the former makes *murder* by a convict punishable with death. (See, also, Tiedeman on Limitations on Police Power, secs. 10, 11, 31.)

3. *Classification as denying equality.*

The grandest principle of our law, rightly termed the safeguard of our liberties and institutions, is that firmly fixed but sometimes misunderstood rule against discrimination between persons or classes merely because they are such. "Misunderstood," we say, because it is sometimes difficult to understand what constitutes discrimination between persons or classes of persons. The reason—aptly termed the "soul" of a law—furnishes an unerring guide to its proper interpretation. Knowing that the reason supporting this rule is the idea that "all men stand equal before the law," we readily see that, in a broad sense, this means equal rights, duties, privileges, and burdens, under laws bearing equally upon all citizens. But when we stop to consider the rights of persons, in view of their relations to other persons and to organized society, and think of the varied conditions arising from vocations and circumstances, creating variant necessities, responsibilities, and duties, we can as readily see that this cannot mean that *every law must at all times apply to every person in the same way.*

Nothing could bring about greater inequality or create more onerous burdens than the strict application of such a rule as this. It would never do to subject the farmer, upon whom all depend, to the same restrictions imposed upon callings deemed injurious instead of beneficial to society. Nor to class tanneries and powder-works with the business of the baker and tailor, which are not offensive or dangerous to any one. It would be burdensome in the extreme, as well as impracticable and unnecessary, to compel the ordinary laborer to submit to regulation in the conduct of his calling, and to examination, in order that he might be certified *a la* the teacher, physician, and lawyer. All men cannot be grocers, druggists, or merchants. All do not conduct saloons, the

aters, slaughter-houses, or hospitals. Happily all men are not lawyers, and unfortunately all cannot hold public office.

Hence, we have an infinite variety of laws, based upon the necessity for regulating the conduct of professional men and public servants, and placing restrictions upon business according to its harmful or beneficial relation toward public health, safety, convenience, or happiness, *ad infinitum*.

Railroads, owing to sparks and speed, make the danger of fire or accident greater than attends other methods of inland transportation; hence the necessity for special rules as to the conduct of such business and touching damage for lack of special precautions and care. All men have a right to use public streets and roads, but all must submit to special rules regulating the use thereof. All have a right to enter public buildings and grounds, but attendants guard the entrance to offices where busy men attend to public duties, and the stroller is frequently admonished to "Keep off the grass." Thus, in the infinite variety of human vocations and character, in the vast compass of human achievement, and great, small, and intermediate human activities, do we find the secret of inequalities, making necessary general laws, adapted to the duties, responsibilities, and necessities arising from conditions and circumstances, and hence applying only to certain classes. And so it is with crime. All crimes are not of the same gravity or nature, and criminals vary in recklessness, depravity, and cruelty. Again, all crimes are not committed in the daytime, nor under the same conditions and circumstances. Of necessity, then, crimes and criminals have ever been divided into classes, and penalties ranging from a nominal fine to the supreme expiation of a forfeited life have been inflicted.

From these considerations we evolve the rule and necessity for classification, according to conditions, vocations, circumstances, duties, and responsibilities, attending the relations of individuals toward the public and toward government in any or all of its branches. Nor are we left groping as to *restrictions* upon such classification. They flow as a logical sequence from the very *necessity* which compels separation into classes. That *necessity* rests upon essential differences in the relations of men toward their fellows and the state, and so do the *restrictions*.

These restrictions may be briefly described by saying that classification must not be arbitrary nor result from mere caprice or the desire or ability to separate and classify. It must not be based on mere physical characteristics, such as height, weight, complexion, or age, nor on race, nativity, mentality, or other personal attribute, which pertains solely to the particular person, and not to any *relation* that person may bear to other persons in the scope of human conduct and activity. Nor may it be predicated upon religious belief, for that pertains to relations between Creator and creature which concern only the individual worshiper, and it is not within the range of enlightened law to question the propriety of such worship, nor make equality depend upon the shrine at which the citizen may kneel.

It must rest upon some substantial, inherent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness, or convenience of the public, when contrasted with the relation, duties, responsibilities, position, or situation of other persons or classes toward the same matters of public concern. (*Missouri v. Mackey*, 127 U. S. 209, [8 Sup. Ct. 1161]; *Mugler v. Kansas*, 123 U. S. 667-669, [8 Sup. Ct. 273]; *Minneapolis v. Beckwith*, 129 U. S. 33, [9 Sup. Ct. 207]; *Holden v. Hardy*, 169 U. S. 366, [18 Sup. Ct. 383]; *Atchison etc. R. R. Co. v. Matthews*, 174 U. S. 96, [19 Sup. Ct. 609]; *St. P. R. R. Co. v. Matthews*, 165 U. S. 25; *L'Hote v. New Orleans*, 177 U. S. 597, [20 Sup. Ct. 788]; *Gulf etc. R. R. Co. v. Ellis*, 165 U. S. 155, [17 Sup. Ct. 255]; *Estate of Campbell*, 143 Cal. 623, [77 Pac. 674]; *Ex parte Jentzsch*, 112 Cal. 474, [44 Pac. 802]; *Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604]; *State v. Fraternal Order*, 35 Wash. 338, [77 Pac. 502]; *Ex parte Northrup*, 41 Or. 489, [69 Pac. 445]; *Atkinson v. Woodmansie*, 68 Kan. 71, [74 Pac. 641]; Sutherland's Notes on U. S. Constitution, p. 728 et seq.; Story on the Constitution, sec. 1961; Cooley on Constitutional Limitations, p. 562 et seq.; Brannan on Fourteenth Amendment, p. 323 et seq.) These authorities not only sustain the proposition to which they are cited, but throw much light on the question to be hereafter determined.

But it is claimed that in the case at bar there is no such difference or distinction as would justify discrimination between life convicts and other felons who make deadly assaults.

We have already noticed *one* very important difference, based on the hopeless and desperate situation in which such convicts are placed, and the utter inability to inflict other adequate punishment upon them.

But there is another important difference. In every state of this Union and elsewhere penalties have always been graded and classified according to the gravity of the crime and situation or character of the criminal.

Our own Penal Code abounds with illustrations proving this assertion. *Burglary* is punished according to the *time* the offense is committed. *Arson* according to the *habitaney* of the premises set on fire. *Assaults* according to the *use of corrosive or caustic substances*. *Bribery* according to the *position* of the official or person bribed. *Embezzlement* according to *official capacity* and the *character* of property stolen. (See appropriate sections of the Penal Code.)

But the strongest analogy exists between the section here assailed and chapters 2 and 3 of the Penal Code, relating to rescues and escapes. There, as here, the punishment is classified according to the *term* for which the prisoner was incarcerated. These sections are based on a very ancient statute, and the principle is entitled to veneration for its age and respect for the soundness long-continued sanction evidences. (2 Bishop on Criminal Law, secs. 1070-1090.) But even stronger is the analogy between section 246 and section 666. The latter section makes the penalty depend upon prior conviction, and upon the term for which the offender *might have been sentenced* on his original conviction, and the *gravity* of the original offense. This section has been assailed on constitutional grounds, and the decision sustaining its validity has been cited with approval by courts of last resort in Massachusetts, Wisconsin, Missouri, and Kentucky, where similar statutes were questioned, as well as by the supreme court of the United States. (*People v. Stanley*, 47 Cal. 113, [17 Am. Rep. 401]; *McDonald v. Commonwealth*, 173 Mass. 322, [17 Am. St. Rep. 293, 53 N. E. 874, 180 U. S. 311, 21 Sup. Ct. 389]; *Moore v. Missouri*, 159 U. S. 675, [16 Sup. Ct. 179]; *In re Boggs*, 45 Fed. 475; *Ingalls v. State*, 48 Wis. 647, [4 N. W. 785]; 2 Bishop on Criminal Law, sec. 959.) Such decision has also been approved by our own supreme court in language too plain to be misunderstood.

(*People v. Coleman*, 145 Cal. 612, 613, [79 Pac. 283].) If classification of crimes and penalties may properly be based on terms of three, five, ten, or any definite number of years, there can be no logical reason why it may not be based on a life term, nor why *life* as well as *liberty* may not be the forfeit. We have preferred to place our decision on this point on broad grounds. It may, however, be remarked, before passing to other questions, that sections 245 and 246 of the Penal Code define and punish very different offenses. It is manifest that convicts already imprisoned for life cannot be further punished under section 245. It is plainly apparent from section 246 that it was designed to provide suitable punishment for such offenders, when there was added to the deadly assault the elements of deliberation and malice. This in itself justifies the classification. But waiving this, the classification is in no sense arbitrary or capricious. It is based on natural, palpable, substantial, and inherent distinctions too plainly marked to be ignored. As was said in argument, it may be that men, good but unfortunate, may sometimes be imprisoned for life. Waiving the rarity and improbability of this, and also waiving the fact that if it be true the sorrow and humiliation of such men will furnish ample security against further misconduct on their part, we are again constrained to say that such considerations are for other departments, and therefore they cannot have force here. This argument, however, was directed to the point that the statute is invalid, because it subjects the convict to double punishment and gives the court power, on first conviction, to declare the penalty which must attach to subsequent transgression. But the same results would obtain in all cases where an increased punishment may be imposed upon offenders twice or thrice convicted, and both propositions were considered and settled in the last line of authorities cited.

4. *Due process of law—Uniformity of operation—Equal protection of the law—General and special laws.*

The reasoning indulged in and the authorities cited touching classification apply with equal force to all questions above enumerated. After all, the one broad principle of "equality before the law" is the test which must be applied to each. Therefore, if we have reached a comprehension of the neces-

sify for classification, and of the reasons requiring separation into classes, we can have little difficulty in understanding the meaning of phrases used in the above subhead. If the multifarious concerns of life result in inequalities affecting man's relation to the purpose of government, and consequent necessity compels classification, in order to prevent resulting and concurrent inequalities in the operation and effect of laws, it follows by the unerring force of reason and logic that if every person, standing in the same situation and relation, under the same conditions, would be punished in the same way under the same law, there is no inequality. This is established by an infinite number of authorities, from a few of which we will borrow apt quotations. "The right to the equal protection of the laws is not denied, when it is apparent that the *same law or course of proceedings would be applied to any other person in the state* under similar circumstances and conditions." (*Tinsley v. Anderson*, 171 U. S. 101, [18 Sup. Ct. 805]; Brannan on Fourteenth Amendment, p. 322, 323.) "Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if *within the sphere of its operation* it affects all persons *similarly situated*, is not within the [fourteenth] amendment." (*Barbier v. Connolly*, 113 U. S. 27, [5 Sup. Ct. 357]; *French v. Davidson*, 143 Cal. 662, [77 Pac. 663].) "The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons *subjected to such legislation* shall be *treated alike* under *like circumstances and conditions*, both in the privileges conferred and in the liabilities imposed." (*Hayes v. Missouri*, 120 U. S. 71, [7 Sup. Ct. 350]; *Brown v. New Jersey*, 175 U. S. 177, [20 Sup. Ct. 77]; *Marchant v. Pennsylvania*, 153 U. S. 389, [14 Sup. Ct. 894]; *Giozza v. Tiernan*, 148 U. S. 662, [13 Sup. Ct. 721]; *Cody v. Murphy*, 89 Cal. 524, [26 Pac. 1081]; *Smith v. McDermott*, 93 Cal. 425, [29 Pac. 34]; *In re Converse*, 137 U. S. 631, [11 Sup. Ct. 191]; *Missouri v. Lewis*, 101 U. S. 22.)

In *Leeper v. Texas*, 139 U. S. 467, [11 Sup. Ct. 577], it is said that "By the fourteenth amendment the powers of

states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; *that law in its regular course of administration through courts of justice is due process*, and when secured by the law of the state the constitutional requirement is satisfied." (*People v. Coleman*, 145 Cal. 615, [79 Pac. 283].) "An act to be general in its scope need not include all classes of individuals in the state. It answers constitutional requirements if it relates to and operates upon the *whole of any single class*." (*Abeel v. Clark*, 84 Cal. 230, [24 Pac. 383].)

We might multiply quotations, but the few we have embodied will answer every purpose; yet profit could be derived from consulting *Pace v. Alabama*, 106 U. S. 583; *Jones v. Brim*, 165 U. S. 183, 184, [17 Sup. Ct. 281]; *L'Hote etc. v. New Orleans*, 177 U. S. 597, [20 Sup. Ct. 788]; *Minder v. Georgia*, 183 U. S. 562, [22 Sup. Ct. 224]; *McDonald v. Connell*, 99 Cal. 386, [34 Pac. 71]; *Aikins v. Wisconsin*, 195 U. S. 205, [25 Sup. Ct. 3]; *West v. Louisiana*, 194 U. S. 263, [24 Sup. Ct. 650]; *Turner v. Williams*, 194 U. S. 293, [24 Sup. Ct. 719]; *M. K. T. Ry. v. May*, 194 U. S. 269, [24 Sup. Ct. 638]; *Cincinnati St. Ry. v. Snell*, 193 U. S. 37, [24 Sup. Ct. 319]; *Detroit Ry. Co. v. Osborn*, 189 U. S. 389, [23 Sup. Ct. 540]; *Hager v. Reclamation Dist.*, 111 U. S. 708, [4 Sup. Ct. 663]; *Otis v. Parker*, 187 U. S. 609, [23 Sup. Ct. 167].

In *State v. Lewin*, 53 Kan. 679, [37 Pac. 169], we find nothing which, well considered, runs counter to the general current of authority. There a summary trial without a jury was provided for, and the punishment was made the same as the original sentence, whether long or short, and was not therefore the same as to all like offenders. The law applied to *all convicts*, yet the prisoner sentenced for one year would go back for one year and the prisoner sentenced for ten years would go back for ten. This made the punishment grossly unequal. In the case at bar, all convicts imprisoned for life are treated alike, under a statute applying to them only. Herein lies the difference between the law there held invalid and the statute here under consideration. But if that case did sustain petitioner's contention, it must fall before the rules of logic and reason pointing to the correctness of the

array of authorities sustaining the conclusion we have reached. Section 246 applies to every person in this state. All may avoid the class, but none within the class are discriminated against. There is no distinction based on race, creed, age, sex, or personal characteristics. Those who by lawless acts bring themselves within its scope must heed the warning it contains. If they fail to do so, they, and not the law, must be held responsible for the terrible consequences entailed by their deliberate acts.

The writ is denied and the prisoner remanded to the custody of the sheriff of Sacramento County.

Chipman, P. J., and Buckles, J., concurred.

[No. 13. First Appellate District.—June 22, 1905.]

**ELIZABETH BRADLEY, Appellant, v. BOARD OF
EDUCATION OF THE CITY AND COUNTY OF
SAN FRANCISCO, Respondent.**

SCHOOL LAW—TENURE OF TEACHERS—SPECIAL CITY CERTIFICATES.—The holders of special city certificates specified in the last sentence of section 1793 of the Political Code are not within the protection of the tenure of office clause provided for in the first part of that section in favor of the holders of city certificates in general. The holder of a special city certificate as teacher of industrial drawing may be dismissed without cause.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Crandall & Bull, and H. M. Barstow, for Appellant.

Percy V. Long, City and County Attorney, and W. I. Brobeck, Assistant, for Respondent.

HALL, J.—This is an appeal from a judgment against appellant on a demurrer to her petition for a writ of mandata, to be directed to the board of education of the city and

county of San Francisco, requiring said board to restore her to the position of regular teacher of industrial drawing in the public schools of said city and county.

Appellant's petition alleges that ever since the sixth day of December, 1875, she was the holder of a drawing-teacher's city certificate, issued, and from time to time renewed, by said board of education, authorizing her to teach drawing in the public schools of said city and county. That on the eighth day of July, 1891, she was duly elected a regular teacher of industrial drawing in the department of schools of said city and county, and so continued until the first day of June, 1897, when her position was by the said board of education declared vacant, and she was by said board dismissed from her said position, without any charges or complaint being made of insubordination, unprofessional conduct, profanity, intemperance, or unfitness for teaching. Her salary as such teacher of industrial drawing at the time of her dismissal was one hundred and forty dollars per month.

Whether or not appellant brings herself within the protection, as to tenure of office or position, of section 1793 of the Political Code and the rule laid down in the *Kennedy case* (82 Cal. 483) is the question presented for decision.

The power to employ teachers is given to city boards of education by section 1617 of the Political Code, which, as was said in *Kennedy v. Board of Education*, 82 Cal. 483, "confers upon boards of education unlimited power to employ teachers, and contains no restrictions upon their right to dismiss or remove for or without cause." It is contended, however, that by the provisions of section 1793 of the Political Code appellant was protected from dismissal except for causes therein specified duly ascertained and approved by the board of education.

At the time of appellant's dismissal that section read as follows: "The holders of city certificates are eligible to teach, in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this act, duly ascertained and approved by the board of education of said cities; and city superintend-

ents of public schools elected by city boards of education shall be elected for a term of four years; and said city boards of education shall have full power to fix the salary of all employees. The holders of special city certificates are eligible to teach the special studies mentioned in their certificates in all the schools in the city in which such certificates were granted."

It is perfectly obvious from an examination of this section that the eligibility to teach of holders of *general city certificates* is fixed by the first sentence of the section, while the eligibility to teach of the holders of *special city certificates* is fixed by the last sentence in the section.

It seems equally obvious that the teachers whose tenure of position is fixed by the first sentence are the same teachers whose eligibility to teach is fixed by the same sentence. The language is: "The holders of city certificates are eligible to teach, in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes," etc. This language deals with the same class of teachers both in fixing the eligibility to teach and in fixing the tenure of position. That the legislature did not intend by this language to lay down any rule as to holders of special city certificates is evident from the subsequent portion of the section, for, after providing for the election and tenure of office of superintendents of public schools and the fixing of salaries of all employees, it takes up the matter of holders of special city certificates, and in a distinct sentence provides for their eligibility to teach, but makes no provision as to their tenure of office or position. Appellant not having shown herself the holder of a general city certificate, but of a special certificate only,—that is to say, of a drawing-teacher's certificate,—we do not think that she is within the protection of section 1793 of the Political Code as to the tenure of her position.

The judgment is affirmed.

Cooper, J., and Harrison, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 18, 1905.

[No. 17. First Appellate District.—June 26, 1905.]

CHARLES A. BALDWIN, Appellant, v. NAPA AND SONOMA WINE COMPANY, Respondent.

APPEAL—ORDER GRANTING NEW TRIAL—PRESUMPTIONS—INSUFFICIENCY OF EVIDENCE—DISCRETION.—Upon appeal from an order granting a new trial in general terms, all presumptions are in favor of the order; and where one of the grounds of the motion was insufficiency of the evidence to justify the verdict, the motion on that ground was addressed to the sound legal discretion of the court, and the order will not be reversed if no abuse of discretion appears.

ID.—CONFLICTING EVIDENCE.—Where the evidence was sharply conflicting upon material issues, the court did not abuse its discretion in granting a new trial for insufficiency of the evidence.

CONTRACT—CONTEMPORANEOUS CONSTRUCTION BY PARTIES.—The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms.

ID.—ACTION FOR BREACH OF CONTRACT TO SELL WINES—AGREED DELIVERY PRO RATA—ESTOPPEL OF PLAINTIFF.—In an action for breach of a contract executed in March of the first year to sell and deliver wines, of which the defendant buyer agreed to take a specified number of gallons each year before September 1st, where the parties by agreement delivered and accepted a *pro rata* number of gallons as a completion of the first year's contract, the plaintiff cannot afterward be allowed to claim a breach for non-delivery of the specified number of gallons before September 1st in that year.

ID.—BREACH BY PLAINTIFF—NEW TRIAL.—Where the evidence fails to show a breach of the contract by the defendant, and shows that plaintiff himself was guilty of a breach in refusing to deliver wine called for by the contract, a verdict for the plaintiff was properly set aside and a new trial granted.

ID.—ACCOUNT OF PLAINTIFF—IMPROPER DEMAND OF PAYMENT—NOTICE OF CANCELLATION.—The plaintiff had no right to render an account and demand payment for wine agreed to be sold and which plaintiff had reserved for other parties, nor to demand payment for a greater number of gallons on the first year's contract than had been agreed to, nor to notify defendant that plaintiff would cause defendant's right to be canceled under the contract unless payment of the account was promptly made.

ID.—INSTRUCTION IGNORING AGREEMENT.—The court erred in giving an instruction for the plaintiff which ignored the agreement by the parties for *pro rata* sale and delivery in completion of the first year's contract.

ID.—IMPROPER MODIFICATION OF REQUEST—REFUSAL TO DELIVER WINES.—The defendant had the right to have the jury instructed that

plaintiff had no right to refuse to deliver any of the wines mentioned before the expiration of a contract year, provided they were within the amount called for by the contract; and it was error to modify a request to that effect by changing its substance.

APPEAL from an order of the Superior Court of the city and county of San Francisco granting a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Harold Wheeler, and M. F. Michael, for Appellant.

M. B. Kellogg, for Respondent.

COOPER, J.—This action was brought by plaintiff to recover damages for breach of a contract for sale of wines by plaintiff to defendant. The case was tried with a jury, and a verdict returned for plaintiff in the sum of \$3,997.17, upon which judgment was entered. Defendant made a motion for a new trial upon the grounds of insufficiency of the evidence to justify the verdict; that the verdict is against law, and errors of law occurring at the trial and excepted to by the defendant. The court granted the motion in general terms.

All presumptions are in favor of the order made by the trial court, and an order granting a new trial will be affirmed here if it is found to be justified upon any statutory ground included in the notice of intention and properly in the record. This court will examine the entire record upon which the order was based, and if there be found in the record any error which would have justified the court in making the order it will be affirmed. (*Kauffman v. Maier*, 94 Cal. 276, [29 Pac. 481]; *Churchill v. Flournoy*, 127 Cal. 362, [59 Pac. 791].) One of the grounds of the motion was the insufficiency of the evidence to justify the verdict, and in such case the motion is addressed to the sound legal discretion of the court, and an order granting a new trial will not be reversed unless it appears that there was an abuse of such discretion. (*Bledsoe v. Decrow*, 132 Cal. 314; *Estate of Mots*, 136 Cal. 560, [69 Pac. 294].)

The contract was made March 29, 1898, and its material

parts, so far as necessary to be stated for the purposes of this opinion, are the following:—

“This agreement, made March 29th, A. D. 1898, by and between C. A. Baldwin of Beaulieu, West Side, Santa Clara County, California, and Napa and Sonoma Wine Company of San Francisco, a corporation:

“C. A. Baldwin sells and the Napa and Sonoma Wine Company buys the following wines at present in the cellar at Beaulieu:

8,500	gallons	Red Wine	1893	at 30 cents per gallon to be taken until January 1st, '99.
9,000	gallons	Red Wine	1894	at 35 cents per gallon.
15,000	“	“	1895	“ “ “ “ “
17,500	“	“	1896	“ “ “ “ “
2,000	“	White	1894	“ “ “ “ “
2,200	“	“	1895	“ “ “ “ “
22,000	“	Red	1897	
3,000	“	White	1897	
3,000	“	“	1896	at 35 cents per gallon.

“All of the above per gallon delivered f. o. b. cars San Francisco; cash less three (3) per cent.

“All wines except 1897 have been accepted; the 1897 wines the purchaser will examine and finally accept at the same price before April 1st, 1899, if he finds them to be equal in quality to previous vintages.

“Wines to be taken in carload lots one at a time, the buyer agreeing to take seventeen thousand five hundred (17,500) gallons each year before September 1st.

“C. A. Baldwin during this contract turns over all his trade foreign and on Pacific Coast he has at present, and all orders that he may get, to the Napa and Sonoma Wine Co. excepting only his trade with G. S. Nichols on the Atlantic Coast, for which he will reserve fifteen hundred (1,500) cases of each vintage; Mr. Baldwin reserving further privilege to sell his common wines not mentioned above in the general market.”

The complaint alleges that although the plaintiff fully kept and performed the contract on his part, the defendant failed and refused to carry out or fulfill the contract on its part in several particulars, all of which is denied by the defendant.

One of the main allegations relied upon is, that defendant refused, and continues to refuse, to accept or pay for any further shipments of wine under the contract. The evidence upon this issue was sharply conflicting, and we think the court did not abuse its discretion in granting a new trial for this, if for no other reason.

The important question was as to who was at fault, or who committed a breach of the contract. The contract, made March 29, 1898, provides that 17,500 gallons of wine shall be taken each year before September 1st. There is some controversy, however, as to whether 17,500 gallons were to be taken before September 1, 1898, as there had then expired only about five months of the first year of the contract. But the parties themselves, by their correspondence and acts, construed the contract as calling only for a *pro rata* of the 17,500 gallons up to September 1, 1898. The letters of defendant to plaintiff show that defendant placed that construction on the contract. Lagarde, plaintiff's manager, who had full authority in the premises, testified that only 10,304 gallons were taken by defendant before September 1, 1898, and that he wrote to defendant, "this completes your first year's contract," and that when the question came up as to the first year being a short one the witness said: "I believe it was understood between Mr. Priber [president of defendant] and myself that would fill it for that year, and afterwards 17,500 gallons would have to be taken each year." The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms. (*Keith v. Electrical Engineering Co.*, 136 Cal. 178, [68 Pac. 598].) The rule would apply with still greater force in a case like this, where the plaintiff is claiming a breach of the contract. He will not be allowed to claim a breach as to the time up to September 1, 1898, when he agreed with defendant that 10,304 gallons completed the first year's contract. We will, therefore, pass to a consideration of the year beginning September 1, 1898.

While the contract provides that defendant shall take 17,500 gallons of wine each year before September 1st, it does not provide that defendant shall take any particular wine first, nor does it provide that the white or red wine, nor the wine of any particular year, shall be taken first, nor the

manner in which it shall be taken, by defendant. Therefore defendant had the right, up to September 1, 1899, under the terms of the contract, to take 17,500 gallons of any of the wine sold to it, provided it give plaintiff reasonable notice, so as to enable him to deliver it. The complaint alleges that up to September 1, 1899, the defendant took and paid for only 17,923 gallons, and has failed and neglected to receive or pay for any greater amount, although often requested by plaintiff to do so. The contract included three thousand gallons of white wine of 1896 at thirty-five cents per gallon.

On July 1, 1899, defendant wrote plaintiff a letter, calling his attention to the fact that a month before it had ordered the 1896 white wine, and that plaintiff asked delay owing to pressing work on the farm, and promised it by September 1st, that defendant had arranged to take the white wine, but was also preparing to take two carloads of the red. To this letter plaintiff replied, July 6th, through his manager, that he was at work on the white wine, and would have the greater part of it, if not all, ready for delivery by September 1, 1899. August 11th defendant again wrote to plaintiff, calling attention to the letter of July 1st, and again requesting the delivery of the 1896 white wine, and reaffirming the order for two carloads of red wine.

To this letter plaintiff replied by letter August 14, 1899, and said: "I must decline again to ship the '96 white wine until you have carried out your agreement with respect to the previous vintage." Here is a positive statement by plaintiff during the year 1899, and before September 1st, that he will not ship the 1896 white wine until defendant has carried out his agreement with respect to previous vintages. We look in vain for any special agreement as to previous vintages.

But defendant again, on August 15, 1899, in answer to plaintiff's letter of August 14th, wrote to plaintiff, and in that letter said: "We cannot see by what right you will decline to deliver us this wine, and we will insist upon the shipment as soon as the same is in condition, which, as stated to us, would be before September 1st." To this letter plaintiff replied August 16, 1899, stating: "I shall gladly ship you the white wine when in condition, but I must decline to deplete my cellar of white wine unless you show a disposition to take up your quota of red."

To this letter the defendant replied August 18th, stating: "We received your favor of the 16th, and in reply can only regret that you again decline to deliver us the '96 white wine, and by so doing clearly show that you do not propose to carry out literally the terms of our agreement. . . . You are the one that was dilatory in action, and now you even break your contract by refusing emphatically the shipment of those 3,000 gallons of 1896 white wine."

Priber, the defendant's president, testified that he ordered the 1896 white wine, and plaintiff refused to ship it; that he "intended to and was able and willing to take all that the contract called for for the second contract year before the 1st of September, 1899, and would have done so, and could have done so, and paid for it. After they had refused to deliver any of the white wine I wrote to them that they had broken their contract."

On September 2, 1899, plaintiff sent defendant a statement of account for breach of contract, which included 8,500 gallons of 1893 red wine at thirty cents per gallon, amounting to \$2,550, and also included the difference of the first contract year up to September 1, 1898, of about 7,500 gallons at thirty-five cents per gallon.

On September 14, 1899, plaintiff wrote to defendant inclosing the statement last referred to as an account, and in the letter stated: "Unless you make payment within the next four days [by September 18, 1899] I shall cancel all your rights under the contract."

It was stated by Lagarde, plaintiff's manager, while a witness on the stand, that 3,750 gallons of the 1893 red wine were reserved by plaintiff for Mr. Nichols for the trade on the Atlantic Coast. Plaintiff did not have the right to demand payment for 3,750 gallons of wine from defendant when plaintiff had reserved the wine for his eastern trade.

And as to the 7,500 gallons claimed in the statement to have been included in the quantity to be taken the first year, as we have before stated, that appears to have been settled by the parties by agreement and acquiescence under the contract.

Other matters claimed to be sufficient to justify the order granting a new trial upon the insufficiency of the evidence are discussed in the briefs, but it is not necessary to discuss

them in detail. What we have said is sufficient to show that the trial court had the right to grant a new trial upon the conflicting evidence. We do not mean to intimate nor express an opinion upon the weight of the evidence or the merits of the case.

The court at plaintiff's request gave the following instruction: "The defendant was bound by the contract to take, receive and pay for 17,500 gallons of the contract wines before September 1st of each year; and if defendant failed to do so, such failure, so long as it continued (unless caused by the plaintiff's default in the performance of what he was to do) constituted a breach of the contract on defendant's part, and entitled plaintiff to consider the contract as abandoned by defendant, and to recover from the latter any damages resulting from such abandonment."

This instruction ignores the agreement by the parties as to the amount of wine to be taken up to September 1, 1898. If, as before stated, the plaintiff agreed to consider a less amount than 17,500 gallons as being the amount called for by the contract up to September 1, 1898, he could not afterwards consider the failure to take the 17,500 gallons as a breach of the contract. By this instruction such failure constituted a breach, if plaintiff chose to consider it so, without regard to any waiver on his part.

Defendant requested the court to give the following instruction: "The court further instructs you that, according to the terms of the contract, the defendant had until the 1st of September, 1899, in which to order and take the amount of wine it had contracted to take for the second contract year, and that before the expiration of such contract year, that is to say, before September 1st, 1899, the plaintiff had no right to refuse to deliver any of the wines mentioned to the defendant, provided the orders of defendant were kept within the annual amount of seventeen thousand five hundred gallons." The court refused this instruction, but gave it after striking out the words "and that before the expiration of such contract year, that is to say, before September 1st, 1899, the plaintiff had no right to refuse to deliver any of the wines mentioned to the defendant."

The instruction should have been given as requested. The plaintiff did not have the right to refuse to deliver any of

the wines mentioned before the expiration of the contract year, provided they were within the amount called for by the contract. Under the evidence the defendant had the right to have the jury so instructed. The instruction as given did not contain all the substance of the requested instruction.

It is not necessary to discuss other alleged errors, for the reason that what has been said shows that the order must be affirmed, and it is so ordered.

Hall, J., and Harrison, P. J., concurred.

[Crim. No. 4. First Appellate District.—June 27, 1905.]

THE PEOPLE, Respondent, v. FRANK BALLARD, Appellant.

CRIMINAL LAW—ROBBERY—ERROR IN ADMITTING DEPOSITION OF WITNESS ROBBED—WANT OF DILIGENCE—INSUFFICIENT SEARCH.—Upon a trial for robbery, it was error to admit the deposition of the witness robbed taken at the preliminary examination on the alleged ground that the witness "cannot with due diligence be found within the state," where there is no competent evidence of such diligence, and the search for the witness was insufficient and perfunctory, without inquiry at last-known place of work outside of the county, though his absence from the county was known to the district attorney.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

H. H. McCloskey, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

HARRISON, P. J.—The appellant was convicted in the superior court for San Francisco of the crime of robbery, and has appealed from the judgment thereon and also from an order denying him a new trial.

The prosecuting witness, Thomas Cronan, upon whom the robbery was committed, was not present at the trial, and the district attorney offered to read in evidence the transcript of his testimony given before the police court at the preliminary examination of the defendant; and for the purpose of laying the foundation for reading the same introduced evidence of his absence from the city, and of the efforts to secure his presence at the trial. The defendant objected to the reading of this testimony upon the ground that no subpoena had been issued for his appearance at the trial on that day, and that the prosecution had not used due diligence to find him. The objection was overruled, and the deposition was read in evidence. To this ruling the defendant excepted, and relies upon the error therein in support of his appeal.

The facts upon which the objection was made, as shown in the bill of exceptions, are as follows, viz.: The trial upon the information was originally set down for January 11, 1904, when it was continued to January 18th, and on that day was again continued until February 1st, and by further continuances on subsequent days to March 29th. On January 17th Cronan was duly subpoenaed to be present as a witness on the next day; and upon a subpoena afterwards issued to the county of Solano a return was made on January 30th by the sheriff of that county that he had received it on January 19th, but had been unable to find the witness in that county. The prosecution caused no other subpoena to be issued for him, nor did it make any further effort to secure his presence at the trial, until March 28th, the day prior to the one on which the trial was had; nor was it shown that the witness was informed or knew of either of the several continuances. On March 28th a police officer went to two places in San Francisco, at one of which the witness was stopping at the time of the commission of the crime, December 5, 1903, and upon making inquiry for him at those places was told that he had left them; but it does not appear that any inquiry was made as to when he left or whither he had gone, nor was it shown that he had been at either of those places since the day of the crime. The officer also testified that the witness was a laboring man, working on the railroad at Richmond whenever he could get work, but it does not appear that any effort was made to find him at Richmond, although the attention of the district attorney was called to the fact that he was not in the city.

Under section 686 of the Penal Code the right of the prosecution to read the deposition of a witness in evidence upon the trial of a defendant in a criminal action is an exception to the right therein given a defendant "to be confronted with the witnesses against him"; and before a deposition can be so read the facts creating the exception must be clearly shown to the court, one of which is that the witness "cannot with due diligence be found *within the state*." The existence of this fact is to be determined by the trial court from the evidence thereon presented to it, and, like its decision upon any other question of fact, will not be set aside unless there is such want of evidence in its support as to show that there was an abuse of discretion in making such decision. (*People v. Lewandowski*, 143 Cal. 574, [77 Pac. 467].) If there is no competent evidence in support of its decision it will be disregarded. (*People v. Plyler*, 126 Cal. 379, [58 Pac. 904].)

In the cases cited by the attorney-general in support of the ruling of the superior court there was an abundance of evidence showing a serious effort on the part of the prosecution to secure the presence of the absent witness; whereas in the present case the record shows such efforts to have been of a perfunctory character, although the absence of the witness was known to the district attorney; and no effort was made to find him at Richmond, where it was testified that he had been at work. It must be held, therefore, that the court erred in permitting the deposition to be read in evidence, and that for this error the judgment must be reversed.

The appellant has also urged that the deposition was itself insufficiently authenticated, and for that reason incompetent as evidence; but as the grounds for this error may be obviated upon another trial it is unnecessary to pass upon its sufficiency.

The judgment is reversed.

Cooper, J., and Hall, J., concurred.

[No. 38. Second Appellate District.—June 28, 1905.]

J. A. HANNAH, Respondent, v. D. J. CANTY, and LAURA A. CANTY, Appellants.

ACTION TO ENFORCE TRUST IN LAND—VENUE—INCIDENTAL ACCOUNTING.

—An action having as its sole object to establish and enforce a trust in land, in which an accounting asked is merely incidental to the action and which necessarily involves the determination of the amount due from plaintiff under the contract recognizing the trust, to be paid as a condition of relief, is a local action, to be tried where the land is situated; and the prayer for such accounting does not entitle the defendants to a change of the place of trial to the place of their residence.

APPEAL from an order of the Superior Court of Tulare County denying a motion to change the place of trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Stanton L. Carter, for Appellants.

The action involves an accounting, and is personal in its nature, and should be tried where the defendants reside. (*Banta v. Wink*, 119 Cal. 78, 51 Pac. 17; *Smith v. Smith*, 88 Cal. 572, 36 Pac. 356; *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. 777; *More v. Superior Court*, 64 Cal. 345, 28 Pac. 117.)

Maurice E. Power, and Hannah & Miller, for Respondent.

The accounting asked for in this case is not sought as a basis of a judgment against the defendants, but solely to ascertain the plaintiff's interest after payment of the amount due from him. (*Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182, 14 Pac. 886; *Staacke v. Bell*, 125 Cal. 315, 57 Pac. 1012.)

SMITH, J.—Appeal from an order of the superior court of Tulare County denying the defendants' motion for a change of the place of trial to Alameda County, which is the place of their residence. The motion was denied on the ground that the plaintiff was entitled to a trial in the county of Tulare, where the lands described in the complaint are situated.

The suit was brought upon a written contract, set out in the complaint, signed by the defendant D. J. Canty, relating to lands therein described, which had been purchased and the title conveyed to Canty under a prior agreement, upon the terms indicated in the writing between him and the plaintiff. In the written agreement Canty acknowledges and declares that the plaintiff, his heirs and assigns, is entitled to one half of the selling price, rents, issues, profits, and proceeds of the land in question, after first deducting therefrom certain sums of money paid by Canty in the acquisition of the land, with interest at the rate of twelve per cent per annum, together with taxes with interest at the same rate; which balance Canty agrees to divide and pay. The lands, it appears from the allegations of the complaint, have not been sold and have become of largely increased value. It is further alleged that Canty executed a deed of the lands to his brother, who afterwards conveyed to the defendant Laura A. Canty, the wife of D. J. Canty; and that the interest of defendant Laura A. Canty and that of her grantor was acquired without consideration and with notice of the rights of the plaintiff in said lands. The defendants, it is further alleged, have received various sums of money as the rents, issues, profits, and proceeds of said land, and expended various sums of money in the payment of taxes, etc., the amounts of which are unknown to the plaintiff; and the plaintiff offers to pay one half of all sums found to be due upon an accounting. The prayer is for judgment, establishing and declaring a trust in the lands in question in plaintiff's favor, and for a conveyance of an undivided one-half interest in said lands to the plaintiff, or a sale thereof under the direction of the court, etc.

There is also a prayer for an accounting for receipts and disbursements on the land; and that plaintiff be permitted to pay into court one half of the resulting balance, etc.; and upon this is based a contention of the appellants, that an action for an accounting is joined with the main action; and hence—on the authority of *Smith v. Smith*, 88 Cal. 572, [26 Pac. 356], and similar cases—that the order should have been denied. But this contention is plainly untenable. The accounting prayed for was a necessary condition, without which the relief sought by plaintiff could not be granted, and hence

was an essential part of his cause of action. Plaintiff does not allege that anything is due him upon an accounting, nor does he pray for any personal money judgment. In *Smith v. Smith*, 88 Cal. 572, [26 Pac. 356], plaintiff did state facts showing that defendant received "large sums of money which greatly exceed all that was necessary to carry on said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith." And plaintiff demanded an accounting, not only as to defendant's dealings with certain real estate, but also as to his dealings with and disposition of some twenty-six thousand sheep and other personal property, "and that plaintiffs have judgment against him for such sum as shall be found to be due upon such accounting, after satisfying such mortgage indebtedness." In the case at bar the accounting is requested only for the purpose of showing how much the plaintiff shall pay to the defendants in order to entitle him to the only relief he seeks, which is the declaration of a trust in the lands in favor of plaintiff, and a conveyance to him of an undivided one-half interest therein; or, in the alternative, the appointment of a receiver and a sale of the lands.

The action is therefore to be regarded as having for its sole object to establish a trust in the lands, and the accounting asked for, as merely incidental to the action; which necessarily involves the determination of the amount due from plaintiff. (*Green v. Brooks*, 81 Cal. 328, [22 Pac. 849].) We are of the opinion, therefore, that the motion was rightly denied. (Const., art. VI, sec. 5; Code Civ. Proc., sec. 392; *Bailey v. Cox*, 102 Cal. 333, [36 Pac. 650]; *Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182, [14 Pac. 686]; *Booker v. Aitken*, 140 Cal. 471, [74 Pac. 11]; *McFarland v. Martin*, 144 Cal. 771, [78 Pac. 239].)

The order appealed from must therefore be affirmed, and it is so ordered.

Allen, J., and Gray, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on August 25, 1905.

[No. 13. Second Appellate District.—June 29, 1905.]

B. F. BALL, Respondent, v. T. S. C. LOWE, Appellant.

ACTION UPON NOTE—PLEADING—ERROR IN COPY—AMENDMENT—CAUSE OF ACTION NOT CHANGED—STATUTE OF LIMITATIONS.—In an action upon a note, in which the complaint alleged a promise to pay the plaintiff, and set forth stock certificates attached thereto, which are alleged to have been pledged to secure the payment of "said note delivered to the plaintiff," but by a clerical error inserted the name of another payee in the copy of the note, an amendment to the complaint made four years after the maturity of the note, which properly describes the note as payable to plaintiff and alleges that it is the same note alleged in the original complaint, corrects the cause of action therein defectively stated, and does not show a new cause of action barred by the statute of limitations.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Lynn Helm, for Appellant.

C. J. Willett, for Respondent.

SMITH, J.—Appeal from a judgment for the plaintiff on the promissory note set out in the amended complaint, which was filed May 14, 1902, more than four years after the maturity of the note. In the original complaint the note sued upon purported to "promise to pay to the order of the First National Bank of Pasadena one thousand dollars," etc. In the present complaint the name of the plaintiff is inserted as payee, in place of "the First National Bank of Pasadena," occurring in the note as set out in the original complaint; and it is alleged "that the note, a copy of which is herein set forth, is the same note alleged in the original complaint," and, in effect, that in the original complaint the name of the First National Bank of Pasadena was inserted instead of the name of the plaintiff by a clerical error.

A demurrer to the amended complaint was filed on the ground that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure, but was over-

ruled, and the defendant failing to answer within the time allowed by the order, judgment against him was entered by the clerk by default.

It is now claimed that a new cause of action was introduced by the amended complaint, and that the demurrer should have been sustained. We are of the opinion, however, that the cause of action in the amended complaint is the same as that intended, but defectively stated, in the original complaint; and that this appears, not only from the express allegations of the amended complaint, but also from the allegation in the original complaint, that the defendant "promised to pay plaintiff the sum of one thousand dollars," etc., and from the stock certificates attached to the original complaint which were pledged by the defendant to secure the payment of "said note delivered to the plaintiff." (See report of the case on a former appeal, *Ball v. Lowe*, 135 Cal. 678, [68 Pac. 106].) The case seems to come within the direct application of the case of *Nellis v. Pacific Bank*, 127 Cal. 166, [59 Pac. 830].

The judgment is affirmed.

Allen, J., and Gray, P. J., concurred.

[No. 3. First Appellate District.—June 30, 1905.]

ANN E. REYNOLDS, Appellant, v. PRESIDIO AND FERRIES RAILROAD COMPANY, Respondent.

PUBLIC NUISANCE—STREET RAILWAY—ABATEMENT BY ABUTTER ON HIGHWAY—PLEADING—INSUFFICIENT COMPLAINT.—The complaint of a private owner of property abutting on a highway does not state facts sufficient to constitute a cause of action for the abatement of a public nuisance consisting of a street railway whose tracks are not laid in the center of the street, as required by its franchise, but are laid a little more than four feet from the sidewalk adjacent to plaintiff's property, where it does not show an injury to the plaintiff different in kind from that which is suffered by every other owner of property on the same side of the street.

Id.—DAMAGES CAUSED BY NUISANCE—DIMINUTION IN RENTAL VALUE—ACTION FOR COMPENSATION.—An averment that the nuisance has damaged the "rental value" of the plaintiff's property in a

specified sum, with a prayer for damages in that sum as incidental to the abatement thereof, cannot help the cause of action, nor constitute an independent cause of action for compensation for "taking or damaging private property" under the constitutional provision therefor, which must be the subject of a separate action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

James Alva Watt, for Appellant.

Jesse W. Lilienthal, for Respondent.

COOPER, J.—The court sustained defendant's demurrer to the amended complaint, and thereupon judgment was entered for defendant. Plaintiff prosecutes this appeal from the judgment, and contends that the demurrer was improperly sustained.

The complaint alleges that plaintiff is the owner of a lot sixty feet in depth fronting forty-two feet on the southerly line of Union Street, between Hyde and Larkin streets, in the city of San Francisco; that the franchise of defendant required it to construct and operate its cable railway as nearly as possible in the center of the street, but that, in violation of its franchise, it forcibly intruded upon said street and the southerly half thereof, and constructed its tracks and subways so that the southerly track and subway was constructed, and ever since has been maintained and operated, within four feet and two inches of the southerly sidewalk of said street in said block, and about eight feet southerly of the line where it would be if constructed as required by its franchise; that the maintenance of said track as aforesaid has for two years next preceding the commencement of the action "and does still deprive plaintiff and her tenants of the use of the southerly half of said street, obstructed the use of the sidewalk in front of plaintiff's said property, obstructed ingress and egress to and from said property, endangered the lives and limbs of the plaintiff, her family, tenants, and the public at large, and has during all said time been and is still a public nuisance and a private nuisance to the plaintiff, has depreciated the rental value of plaintiff's said property to the

plaintiff's damage in the sum of seven thousand eight hundred dollars."

Judgment is prayed that the defendant's tracks in said block be adjudged to be a public nuisance, and a private nuisance to plaintiff, and that they be abated, and the defendant enjoined from maintaining its tracks and operating its cars thereon, and for damages in the sum of seven thousand eight hundred dollars.

The theory of the plaintiff is, that the obstructions placed upon the public street by the defendant constitute a public nuisance, and that such nuisance is specially injurious to her. Anything which unlawfully obstructs the free passage or use in the customary manner of any public street or highway is a nuisance. (Civ. Code, sec. 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, sec. 3480.) "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, sec. 3493.)

The well-recognized rule in this state is, that in order for a private person to maintain his action for the abatement of a public nuisance he must allege and prove that the injury to him is not only greater in degree but different in kind from that suffered by the public at large. Any obstruction placed on a public street or highway would probably not affect any two individuals of that uncertain quantity known as the public in exactly the same degree. The person who had occasion to use the street every day would, of course, suffer more injury than one who only used it occasionally.

We cannot find from the language of the complaint in this case that the plaintiff has suffered any injury different in *kind* from that suffered by every person who has had occasion to pass on the public street. The first statement is, that the obstruction deprives plaintiff and her tenants of the use of the southerly half of the said street. This, if so, is equally true as to all other persons who have had occasion to use the southerly half of said street. The next statement is, that the operation of the track obstructs the use of the sidewalk in front of plaintiff's property. It is not clear how the track

and the operation of the cars upon it, more than four feet from the sidewalk, could obstruct the use of the sidewalk; but if this is true the same would be equally true as to every other person whose property is similarly situated and as to every person desiring to use this sidewalk.

Then follows the statement that the operation of the cars and the maintenance of the track "has obstructed ingress and egress to and from said property, endangered the lives and limbs of the plaintiff, her family, tenants, and the public at large."

The obstruction of ingress and egress to and from the plaintiff's property is not different in kind from that suffered by every other owner of property along the street in the vicinity of the alleged obstruction. The use of the street by any one, whether by operating cars upon, or driving teams over, or passing on foot along the street would obstruct ingress and egress to and from the property situated upon the street; and the same is true as to endangering the lives and limbs of plaintiff and her tenants. The lives and limbs of all persons who have occasion to use the sidewalk or street are more or less endangered by the use of the street for all other purposes, whether by driving teams over it, riding on horseback, or operating cars upon it. There is no allegation that the obstruction prevents the plaintiff from having access to and from her property, nor is it alleged that the track of defendant is above or below the surface of the street, nor that the cars stand upon it in front of plaintiff's property. We must therefore presume that the tracks are the ordinary car-tracks of a street railway, and that the cars pass over and along the track four feet and two inches from the line of the sidewalk in front of plaintiff's property at intervals, and that during the greater part of the time there are no cars passing in front of plaintiff's lot. Such obstruction clearly would not prevent the plaintiff from getting on or off her lot to the public street.

In *Aram v. Schallenberger*, 41 Cal. 450, it was held that a private individual could not maintain an action to abate a nuisance caused by obstructing a public highway, unless he showed special damages to himself. The court said: "No doubt a private individual may sue to prevent or abate a public nuisance; but he must always show some special damage to himself in addition to that received by the public. The

rule is plain, and has always, so far as I know, been adhered to. . . . No special injury to their property is averred, and although from the facts stated we may conclude that the inconvenience to them will be greater than to the general public, it results simply from the more frequent occasion they may have to travel the road, and is of the same nature as would occur to any other person who might have occasion to use it."

In *Jarvis v. Santa Clara Valley R. R. Co.*, 52 Cal. 438, the defendant had obstructed the navigation of a navigable stream. The complaint alleged that the obstruction "was a nuisance and a perpetual obstruction to the navigation of the creek, and delayed the plaintiffs in the navigation of their vessel." It was held that the facts stated did not show damage "differing in kind and character from that suffered by members of the general public having occasion to use the navigable stream," and that the action would not lie.

In *Bigley v. Nunan*, 53 Cal. 404, the obstruction consisted of a fence running lengthwise along the middle of the street and connected by cross-fences with the side of the street opposite to the premises of plaintiff. It was held that the action by a private individual would not lie. The court said: "The access from plaintiff's lot to the street has not been cut off or impeded, and if plaintiff or his immediate neighbors have more occasion to pass through the street than the public at large, this is an inconvenience in degree only, and is not an injury in *kind* different from that sustained by the public. The only damage complained of by plaintiff is that, by reason of the obstruction, his property is lessened and decreased in value. But it has been expressly held by this court that in an action to recover special damages, caused by placing an obstruction in the street opposite the residence of a plaintiff, evidence to show that the land would sell for less on account of the nuisance is not admissible."

In *Hogan v. Central Pacific R. R. Co.*, 71 Cal. 83, [11 Pac. 876], the defendant had placed an embankment and railway track along Sacramento Street opposite plaintiff's property. It is said in the opinion: "The facilities and means of ingress and egress to and from plaintiff's land, and the free use and occupation thereof, were obstructed by the embankment and track. . . . Plaintiff suffered no injury by reason of the con-

struction and operation of the railroad different in character or kind from that which other landowners fronting on the line of the street have suffered. . . . We are of opinion the judgment in favor of defendant was proper and should be affirmed."

(See, further, *San Jose Ranch Co. v. Brooks*, 74 Cal. 463, [16 Pac. 250]; *Siskiyou Lumber Co. v. Rostel*, 121 Cal. 511, [53 Pac. 1118]; *Quincy Canal v. Newcomb*, 7 Met. 276, [39 Am. Dec. 778]; *Fogg v. Nevada etc. R. R. Co.*, 20 Nev. 429, [23 Pac. 840]; *Baker v. Selma etc. Ry. Co.*, 135 Ala. 552, [93 Am. St. Rep. 42, 33 South. 685]; *O'Brien v. Norwich etc. R. R. Co.*, 17 Conn. 372; Thompson on Highways, p. 256, and cases cited.)

The cases of *Fisher v. Zumwalt*, 128 Cal. 493, [61 Pac. 82], and *San Francisco Sav. Union v. R. G. R. Petroleum etc. Co.*, 144 Cal. 134, [103 Am. St. Rep. 72, 77 Pac. 823], are not inconsistent with what has been said. In *Fisher v. Zumwalt* the odors and stenches from the defendant's tanks polluted the atmosphere in and about the dwelling-house of plaintiff; and the court held that the fact that it affected many other dwelling-houses did not prevent a private person from bringing his action to abate it. The court said: "There is no doubt but that there are many nuisances which may occasion an injury to an individual from which an action would not lie by him in his private capacity, unless he can show special damage to his person or property differing in kind and degree from that which is sustained by other persons who are subjected to similar injury. Among such may be mentioned the invasion of a common and public right which every one may enjoy, such as the use of a highway, or canal, or public landing place. . . . In the one case the invasion is of a public right which injures many individuals in the same manner, although it may be in different degrees. In the other case no public or common right is invaded, but by the one nuisance the private rights and property of many persons are injured."

In *San Francisco Sav. Union v. R. G. R. Petroleum etc. Co.*, 144 Cal. 134, [103 Am. St. Rep. 72, 77 Pac. 823], the obstruction prevented the plaintiff from access to the ocean. The court said: "An obstruction to navigation, in so far as it would prevent the plaintiff from the right to the free use of

the public waters just as it would prevent every one else, would in one sense be an injury suffered alike by all the public. But the plaintiff has the right to free access from his land to the ocean. The obstruction of this right is a damage different in kind from that suffered by the general public, and in such case a private person may maintain his action."

We know of no case, and none has been cited, where it has been held that an obstruction to a public highway may be abated by a suit at the instance of a private party, where the damage is not different in *kind* from that suffered by the public at large.

Plaintiff earnestly contends that the cases of *Kishlar v. Southern Pacific R. R. Co.*, 134 Cal. 636, [66 Pac. 848]; *St. Clair v. San Francisco etc. Ry. Co.*, 142 Cal. 647, [76 Pac. 485]; and *Smith v. Southern Pacific R. R. Co.*, 146 Cal. 164, [79 Pac. 868], are authority in support of this action. Those cases were all actions to recover damages, and not for the purpose of abating a nuisance.

It has long been settled that under our present constitution an abutting owner may maintain an action to recover the damage which he suffers through the occupation of a street by a railway company. (*Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, [42 Am. St. Rep. 149, 37 Pac. 750].) These decisions are placed upon the constitutional provision that private property shall not be taken or damaged without just compensation to the owner. But the gravamen of this case is the abatement of a nuisance. It is alleged incidentally that the nuisance has depreciated the rental value of plaintiff's property to plaintiff's damage in the sum of seven thousand eight hundred dollars. It is not alleged that the value of the property has been depreciated, but its "rental value."

The nuisance may have depreciated the rental value of plaintiff's property, and yet not have damaged the plaintiff. In an action for damages the plaintiff must show that he has sustained some injury for which he can recover damages, and the object of the action must be the recovery of such damages. We cannot, under the most liberal rules, hold that this is an action for compensation for "taking or damaging private property."

The judgment is affirmed.

Hall, J., and Harrison, P. J., concurred.

[No. 24. Second Appellate District.—June 30, 1905.]

A. McALLISTER, Respondent, v. ISABELLA W. TINDAL, Appellant.

JUSTICE'S COURT—ACTION INVOLVING TITLE TO REALTY—INSUFFICIENT SHOWING.—A mere bald allegation in an unverified answer in a justice's court that "the determination of the action will necessarily involve title to real property," without the statement of any fact from which such conclusion would follow, is insufficient to authorize the justice to certify the case to the superior court, and the case was not legally before it for determination.

ID.—WANT OF JURISDICTION—DENIAL OF MOTION TO CHANGE VENUE.—The superior court, having no jurisdiction of the action, did not err in denying a motion to change the place of trial thereof.

APPEAL from an order of the Superior Court of San Luis Obispo County denying a motion for change of venue. **E. P. Unangst, Judge.**

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Appellant.

William Shipsey, for Respondent.

ALLEN, J.—This action was brought in a justice's court to recover a judgment for personal services and rent. An answer was filed, which, while not controverting the facts of the complaint, denied indebtedness, and by way of further answer alleged that the determination of the action would necessarily involve title to real property. This opinion in the answer was not supported by any statement of fact. The justice certified the case to the superior court, which court, on motion, remanded the cause to the justice for trial. Before such order of remand, a motion was interposed in the superior court, supported by affidavit, demanding a change of the place of trial to the city and county of San Francisco, being the county in which defendant resided. The court refused to grant a change of the place of trial, from which defendant appeals.

The verified answer filed in the justice's court did not conform to the requirements of section 838 of the Code of Civil

Procedure. The mere statement of the opinion of the affiant that the title to real estate would be brought into issue on the trial is not sufficient. Facts should be stated from which such conclusion would follow.

The action of the justice in certifying the case was unauthorized, and the case was therefore not legally before the superior court for determination. (*Arroyo Ditch Co. v. Superior Court*, 92 Cal. 47, [27 Am. St. Rep. 91, 28 Pac. 54].) The court having no jurisdiction of the action, it would of course follow that there was no error in denying the motion to change the place of trial.

Order affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 29. Second Appellate District.—July 1, 1905.]

GEORGE RENWICK et al., Respondents, v. MARGARET GARLAND, as Executrix, etc., Appellant.

ESTATES OF DECEASED PERSONS—CONTRACT BY EXECUTRIX TO DRILL WELL—ESTATE NOT LIABLE.—In an action upon a contract by an executrix to drill a well on the property of the estate, it is error to order the judgment paid out of the assets of the estate. The rule is that executors and administrators cannot by virtue of their general powers as such make any contract which will bind the estate; but on contracts for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets.

ID.—COMPLAINT AND JUDGMENT AGAINST EXECUTRIX AS SUCH—AMENDMENT—WANT OF JURISDICTION.—Where the complaint and judgment are against the executrix, as such, payable out of the assets of the estate, the court has acquired no jurisdiction over the executrix in her personal capacity; and the proceedings cannot now be amended and a personal judgment against her entered.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Otis & Gregg, and Charles E. Truesdell, for Appellant.

Hight & Swing, and Hight & Hight, for Respondents.

SMITH, J.—Appeal on judgment-roll, with bill of exceptions, from a judgment for the plaintiffs. The suit was brought to recover the balance due on contract made by the plaintiffs with the defendant, as executrix, by which plaintiffs agreed that they “would drill a well for defendant on the property of said estate in said county,” etc.

The answer alleges the terms of the contract more specifically, and perhaps differently. But the court found that the contract was as alleged in the complaint, and that the same was fully performed according to its terms; and, as conclusions of law, that plaintiffs were entitled to recover the amount claimed in the complaint, with interest and costs, “and that said amount be paid to plaintiffs from the funds of the estate of said Richard H. Garland, deceased.”

It is urged by the appellant that the findings of the court are not justified by the evidence; and also that a judgment against the estate cannot be maintained. The latter point, we think, must be sustained. “The rule is that executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate and authorize a judgment *de bonis decedentis*. But on contracts made by them for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets.’ Schouler on Executors and Administrators, sec. 256, and numerous authorities there cited.” (*Sterrett v. Barker*, 119 Cal. 495, [51 Pac. 695]; *Melone v. Davis*, 67 Cal. 281, 282, [7 Pac. 703]; *Eustace v. Jahns*, 38 Cal. 21; Code Civ. Proc., sec. 1582 et seq.; *Austin v. Munro*, 47 N. Y. 360.) The last case is cited by the court in *Sterrett v. Barker*, and it is said: “This case also holds that the complaint cannot be amended so as to constitute an action against the executor individually. It would be an entire change of the party defendant, and a different suit.” And the same point is ruled in the case of *Van Cott v. Prentice*, 104 N. Y. 45, [10 N. E. 257]. These authorities, or rather the California case cited, seem to be conclusive of this case. We are not, indeed, prepared to hold that the complaint is not amendable, upon a proper showing, under section 473 of the Code of Civil Procedure, nor the contrary. But it seems to be at least clear that the court has acquired

no jurisdiction of Mrs. Garland in her personal capacity, and that the proceedings cannot now be amended and a personal judgment against her entered.

For these reasons the judgment must be reversed, and it is so ordered.

Allen, J., and Gray, P. J., concurred.

A petition for a hearing of this cause was denied by the district court of appeal on July 31, 1905.

[No. 30. Second Appellate District.—July 1, 1905.]

H. F. PETERS, Respondent, v. C. W. GEORGE, Appellant.

ACTION UPON CONTRACT FOR PLAINTIFF'S BENEFIT—SALE BY WIDOW AND HEIR—AGREEMENT AS TO PAYMENT.—In so far as a contract for the payment of a certain sum as the price of property sold by the widow and sole heir at law of her deceased husband to the defendant, in excess of a sum paid to the defendant, was made expressly for the benefit of the plaintiff as a creditor of the estate, to whom defendant agreed that it should be paid, the contract is enforceable by the plaintiff.

ID.—TIME OF PAYMENT.—No time for performance of the contract of sale being specified therein, the money was payable immediately.

ID.—RELEASE OF ESTATE IMMATERIAL.—It being no part of the contract that the payment to the plaintiff was to depend upon a release of the estate from his claim as a creditor thereof, it is immaterial whether he executed such release or established it by proof.

ID.—STATUTE OF FRAUDS.—The statute of frauds is inapplicable to the agreement of defendant to pay the plaintiff a part of the price of the property sold.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

E. J. Emmons, and S. G. Edwards, for Appellant.

The plaintiff was required to prove a release of the estate. (*Gyle v. Shoenbar*, 23 Cal. 538.) The agreement was within

the statute of frauds as an agreement to transfer the debt of another.

Reardan & Whitaker, for Respondent.

There was no contract for a release. There is no difference between payment to A and to A's order, or to a creditor agreed to be paid. (*Wellington v. Sedgwick*, 12 Cal. 475.) The statute of frauds is inapplicable. The defendant was paying his own debt for purchase money. (*Meyer v. Parsons*, 129 Cal. 656, 62 Pac. 216.)

ALLEN, J.—The complaint alleges, and the court finds, that one May Webb, as the widow and sole heir at law of Birt Webb, sold certain property inherited by her from the estate of her husband to defendant for the sum of four hundred and fifty dollars, of which amount one hundred dollars was paid to the said May Webb, and the remainder was by defendant agreed to be paid to the plaintiff, who was then a creditor of the estate of Birt Webb. Judgment went for plaintiff, and defendant appeals from the judgment.

No time for the performance being specified, the money was payable immediately. (Civ. Code, sec. 1657.) The contract as to the excess above one hundred dollars was made expressly for the benefit of the plaintiff, and is enforceable by him. (Civ. Code, sec. 1559.) It is immaterial whether he executed or established by proof his release of the estate on account of previous indebtedness. Such release was not a subject of the contract, nor was the payment to plaintiff dependent thereon. The statute of frauds was not involved.

Judgment ordered affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 89. Second Appellate District.—July 1, 1905.]

A. LEVIS, and GEORGE NUNNEMAKER, Respondents, v. ROYAL PACKING AND DRYING COMPANY, Appellant.

SALES—UNWARRANTED REFUSAL TO ACCEPT—TENDER.—Under a written contract for the sale and purchase of five carloads of prunes, to be paid for on delivery, the unwarranted refusal of the purchaser to accept the remainder after receiving the first carload, and the non-acceptance of a written offer to deliver the remainder within the time agreed, was equivalent to an actual production and tender of the property by the vendor.

ID.—ACTION FOR BREACH—LOSS ON RESALE—MEASURE OF DAMAGES—DECREASE IN MARKET VALUE.—In an action for breach of the contract to buy the remainder of the prunes, where it appears that after the rejection and refusal to accept them, and during the time for delivery, the price declined, and plaintiff promptly resold the prunes, boxed as originally directed by defendant, to other purchasers, at the identical market where delivery was required, such resale was in the line of the plaintiff's duty under section 3311 of the Civil Code, and the measure of damages is the decrease in the market value so ascertained.

ID.—UNAMBIGUOUS CONTRACT—EXPLANATORY TESTIMONY.—The contract being unambiguous, there was no error in rejecting testimony explanatory thereof.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. **M. L. Short, Judge.**

The facts are stated in the opinion of the court.

Will M. Beggs, and G. G. Murry, for Appellant.

Charles G. Lamberson, for Respondents.

ALLEN, J.—Action for damages alleged to have been sustained by plaintiffs from violation of a contract of defendant to buy and pay for certain personal property. Findings and judgment went for plaintiffs. Defendant appeals from the judgment and order denying a new trial.

The record discloses that on August 27, 1901, defendant entered into a written contract to buy of plaintiffs five carloads of prunes of certain sizes designated, to be delivered in

the first half of October, f. o. b. at Visalia, packed in sacks or boxes, to be paid for on receipt of bill of lading. Subsequently the time for delivery was extended during the month of October. Again, upon defendant's request, time of delivery was extended to November 15th. During October one car was shipped to defendant and paid for. On November 1st defendant notified plaintiffs that the remaining cars would not be accepted, for the reason that the prunes were not up to the count, were improperly cured, and were cracked. This rejection was based upon an examination by a proposed buyer, who, in company with the defendant's agent, visited plaintiffs' warehouse the latter part of October and made an examination of certain prunes then in the bins of said warehouse. Afterwards, on November 3d, plaintiffs notified defendant, in writing, that the goods were on hand ready for delivery under the contract, and that no extension of time beyond the 15th of November could be granted. To this defendant never made reply, and never received or ordered the goods as per previous arrangement.

The court finds, and there is testimony in its support, that defendant's refusal to accept the prunes was not justified by the facts, and was therefore unwarranted. The market having declined between the date of the contract and November 15th, plaintiffs were compelled to sell the property in the market where originally sold, at a loss, for the amount of which judgment was rendered.

The contention that no authority was given the writer of the letter of October 18th to ask on behalf of defendant an extension of time for delivery to November 15th is not borne out by the record. In addition, there was other testimony establishing such extension of time. The letter of plaintiffs to defendant, properly admitted in evidence, was sufficient as an offer in writing to deliver the property sold within the time agreed upon. The refusal on defendant's part to accept the offer is equivalent to actual production and tender of the property. (Code Civ. Proc., sec. 2074.) There was testimony tending to show that after the rejection and refusal to accept, and within the month of November, plaintiffs resold the prunes, boxed as originally directed by defendant, to other purchasers, such sale being at the identical market where the original contract required delivery and at the mar-

ket value, which was in line with the duty devolving upon plaintiffs by section 3311 of the Civil Code. The amount of the judgment is based upon the decrease in such market value, the same being the proper measure of damages.

There was no prejudicial error in admitting copies of the correspondence or in the refusal of the court to strike out the same. The matters therein were not material.

The contract was unambiguous, and there was no error in rejecting testimony explanatory thereof.

There are more than a hundred other exceptions appearing in the statement, but an examination of them satisfies us that they possess no merit.

Judgment and order affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 26. Third Appellate District.—July 1, 1905.]

J. L. MAURER, Respondent, v. S. F. WEATHERBY,
Treasurer of City of Eureka, Appellant.

MUNICIPAL CHARTER—DUTY OF ASSESSOR—POWER OF CITY COUNCIL TO CONTRACT FOR SPECIAL DATA.—Where a municipal charter makes the general law pertaining to revenue and taxation for state and county purposes applicable to revenue and taxation for city purposes, and the powers of the city council are as unlimited as the powers of the boards of supervisors, the council has power, in aid of its work of equalization in cases of undervaluation, to make a special contract for an abstract of the assessment-roll by the city, with comparisons with the county assessment-roll, and with maps and other data and information relevant to undervaluation not included in the information required from the city assessor, and to order the compensation therefor paid out of the city treasury.

Id.—MANDAMUS—EVIDENCE—WILLINGNESS OF ASSESSOR IMMATERIAL.—In a proceeding for a writ of mandate against the city treasurer to compel the payment of a warrant for such compensation, evidence of what data the city assessor had the ability and inclination to furnish was immaterial, and was properly excluded.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

E. P. Campbell, and Edwin S. Easley, for Appellant.

J. H. G. Weaver, and Coonan & Kehoe, for Respondent.

McLAUGHLIN, J.—The plaintiff applied for a writ of mandate commanding the defendant as city treasurer of the city of Eureka to pay a warrant drawn in plaintiff's favor by the proper officers of said city. A trial was had and judgment was entered directing that a peremptory writ of mandate issue commanding the defendant, as such treasurer, to pay the amount of the warrant.

The defendant appeals from said judgment and from the order denying his motion for a new trial. The warrant was drawn in payment for certain services performed under a written contract the validity of which is the bone of contention on this appeal. Said contract was between the city of Eureka and plaintiff, and there seems to be no objection as to its form or proper execution. The services to be rendered are set forth in the agreement in the following language:—

“The said party of the second part hereby agrees to furnish and render to the council of Eureka, and to the council sitting as a board of equalization, certain maps, data, and information and services as follows, to wit: An abstract of the assessment-roll of the city of Eureka, with various comparisons with the county assessment-roll of Humboldt County, California, and with maps, and other data and information, showing a gradual raise in such properties as may be deemed undervalued in their present assessed valuations. In the said properties are included real property and the improvements thereon and personal property. These maps, data, and information are to be of such character as will aid the council, as such, and as sitting as a board of equalization, in equalizing the assessment-roll and the taxation of the properties in the city of Eureka. The above abstracts, maps, data, and information are to be furnished to the council any time between now and the final adjournment of the council sitting as a board of equalization when requested.”

The main contention of appellant is, that this contract is void for the reason that the services to be rendered are included in the legal duties of the city assessor, and hence that the council could not legally employ plaintiff to perform them.

Section 79 of the charter of Eureka makes the general law pertaining to revenue and taxation for state and county purposes applicable to revenue and taxation for city purposes. Upon all officers of the city the same powers are conferred and the same duties imposed as rest upon county officers in relation to such matters. The city council and city assessor under this section are vested with powers and duties co-extensive with the powers and duties of boards of supervisors and county assessors. The only substantial exceptions are that the city assessor instead of the county recorder must prepare the abstracts of encumbrances provided for in section 3678 of the Political Code and "furnish such information as may be required." It will thus be seen that whatever duties rest upon a county assessor are imposed upon the city assessor, and that the powers of the city council are as unlimited as the powers of boards of supervisors in such matters.

The general law provides that the board of supervisors must furnish the assessor with certain maps, blanks, and data, but we can find no law requiring the county assessor to do more than to give the board the benefit of his experience and advice and an explanation of the basis or rule governing his valuation. He must give the board such information as he possesses, but he is not required to make special investigations, comparative statements, maps, and general abstracts. (Political Code, secs. 3630, 3651, 3654, 3658, 3677, 4300.) The charter imposes no greater duties upon the city assessor. These services are not included in the general phrase providing that "he must furnish information required." He must furnish the abstracts necessary to enable him to make an assessment, but no more. The contract here provides for services with which the assessor has nothing whatever to do. The board of equalization is practically a board of review to pass upon his work, and it would be passing strange if they could have recourse to no other source of information than the person upon whose work they sit in judgment. Boards of equalization cannot increase an assessment unless they have evidence before them justifying such increase. (*Oakland v. Southern Pac. Co.*, 131 Cal. 230, [63 Pac. 371].)

When an assessment is too high the taxpayer may be depended upon to furnish the evidence upon which they may act in reducing it. But if there is an undervaluation, the

assessor having recorded his best judgment on the face of the assessment-roll, we have no doubt that the board may call to its aid such maps, abstracts, data, and information as will enable the members to act fairly, intelligently, and legally in equalizing assessments. They are not limited to information and data the assessor may be able or willing to furnish. (*Lewis v. Colgan*, 115 Cal. 529, [47 Pac. 357]; *Kansas Pacific Ry. Co. v. Riley County Commrs.*, 20 Kan. 141; *City of Grand Rapids v. Welleman*, 85 Mich. 234, [48 N. W. 534]; *Bardrick v. Dillon*, 7 Okl. 535, [54 Pac. 785]; *Am. Digest*, 1892, p. 4883; *La Grange etc. Co. v. Carter*, 142 Cal. 565, [76 Pac. 241].)

If the powers of the board were so limited, then when the assessor was content with the valuation there could be no evidence upon which to base an increase. And if their powers are not so limited, they may legally enter into *bona fide* contracts for such services as are provided for in the contract under consideration.

There was no error in excluding the testimony of the assessor touching the information he had the ability and inclination to furnish. This had no relation to the vital point in the case, which was not what he may have been willing to do, but what he was compelled to do, under the law defining his duties. This was a question of law, and not of fact.

This disposes of all questions presented by the pleadings and discussed in the briefs.

The judgment is affirmed.

Buckles, J., and Chipman, P. J., concurred.

[Crim. No. 9. Third Appellate District.—July 3, 1905.]

THE PEOPLE, Respondent, v. THOMAS WAYSMAN,
Appellant.

CRIMINAL LAW—MURDER—INSTRUCTIONS AS TO MALICE.—An instruction as to the definition of malice found in section 7 of the Penal Code is not appropriate in defining the crime of murder, and would better be omitted; but the giving of it is not prejudicial where at the

request both of the people and of the defendant special instructions were given defining the malice mentioned in section 188 of that code, and the jury were instructed that unless the evidence showed the elements of the crime charged there defined, they must acquit the defendant.

ID.—INSTRUCTIONS AS TO APPEARANCE OF DANGER—"REASONABLE MAN."

—Where the jury were correctly instructed as to the law concerning appearances of danger to the defendant as a reasonable man, an instruction that "the 'reasonable man' of the law is each particular juror standing as near as the efforts of the law can place him in the precise condition the defendant stood when he committed the act," though not lucid, is not misleading.

ID.—INSTRUCTIONS AS TO REASONABLE DOUBT—REPETITION—INSTRUCTION NOT MISLEADING.

—Where the court gave correct instructions as to the law of reasonable doubt it was not necessary to repeat them; and where the court instructed the jury at defendant's request that if they entertain a reasonable doubt upon any single fact or element necessary to constitute the crime it is the duty of the jury to acquit, they could not be misled by an instruction for the people that if they entertain a reasonable doubt upon any material fact inconsistent with the defendant's guilt they should acquit.

ID.—MANSLAUGHTER—MALICE—MODIFICATION OF INSTRUCTION.

—Malice is no part of the definition of manslaughter, and it was proper to modify an instruction offered by the defendant on manslaughter by striking out a part including malice as an element thereof.

ID.—CREDIBILITY OF WITNESSES—TESTIMONY OF DEFENDANT—PROVINCE

OF JURY.—Where the defendant was a witness in his own behalf the province of the jury was not invaded by an instruction to the effect that they are the exclusive judges of the evidence and of the credibility of the witnesses, and of the weight to be given to their testimony, and that, in determining it, they may consider the character and appearance of the witnesses, the consistency and reasonableness of their statements, and the interest, if any, they may feel in the case.

APPEAL from a judgment of the Superior Court of Shasta County. Charles M. Head, Judge.

The facts are stated in the opinion of the court.

G. V. Martin, and E. B. Mering, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was informed against for the crime of murder, and upon his trial was convicted by the

jury of murder in the second degree and was sentenced to imprisonment for fifteen years. He appeals from the judgment. The evidence taken in the case is not before us. The errors complained of relate exclusively to certain indicated instructions, given or refused by the court.

1. The court instructed the jury as follows: "The word 'malice' imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

It is contended that the malice which enters into the crime of murder, as an essential element thereof, and as referred to in sections 187 and 188 of the Penal Code, is something more than malice which simply "imports a wish to vex, annoy, or injure another person"; that the malice stated in the instruction could be predicated of a very trivial act which would wholly fail to manifest "a deliberate intention unlawfully to take away the life of a fellow-creature"; or from which it might be implied that "no considerable provocation appears," or which would fail to show "an abandoned and malignant heart." (Civ. Code, sec. 188.) If the jury had been left to be guided alone by this instruction as to what would constitute malice when applied to the charge of murder, we should be inclined to hold it prejudicial. The instruction is taken from section 7 of the same code, where certain terms are defined in the senses in which they are used in this code. The word "malice" is there given the meaning above defined, "unless otherwise apparent from the context"; and where used in defining the crime of murder it does mean something more than the word imports as defined in section 7. We do not think the definition found in section 7 appropriate in a case of this kind, and would be better omitted altogether. It was given, however, in *People v. Dice*, 120 Cal. 189, [52 Pac. 477], which involved the crime of murder, in connection with the definition of malice as found in section 188, and the same objection was made as is now urged. The court said: "We think the complaint unfounded. The court but instructed the jury as to the general import of the word 'malice,' and immediately and in the same connection specifically defined the word when used in the code as an element of the crime of murder."

The question as presented in the case now here differs from

that in *People v. Dice* only in the fact that the instructions of the court upon the malice required to constitute murder are separate from the one of which complaint is made. Both for the people and also at the request of defendant specific instructions were given defining the malice mentioned in section 188, and the jury were told that unless the evidence showed the presence of the elements of the crime charged, there defined, they must acquit the defendant. We think the case is thus brought within the rule in *People v. Dice*.

2. The court instructed as follows: "The 'reasonable man' of the law is each particular juror, standing as near as the efforts of the law can place him in the precise condition the defendant stood at the time he committed the fatal act." This instruction was given in connection with others correctly stating the doctrine of appearances. The court probably meant to tell the jury that in judging of the apparent danger with which defendant claimed he was confronted, each juror must put himself in the place of the defendant and decide as a "reasonable man" whether he under like circumstances would have regarded himself as in imminent danger of great bodily injury. The instruction is not particularly lucid, but read in connection with the instructions immediately preceding it, the jury could not have been misled by it to defendant's injury, even though they did not understand precisely what was meant by it.

3. The doctrine of reasonable doubt was correctly given to the jury, and the instructions respecting it are not open to the criticism made by appellant. Several instructions were given in which no mention was made of this doctrine; it was not necessary to repeat it after having been once clearly stated. (*People v. McRoberts, ante*, p. 25, [81 Pac. 734].)

4. The jury were correctly and fully instructed as to the law of manslaughter and self-defense. In an instruction (13), given at defendant's request, defining manslaughter, the court struck out the concluding paragraph. This was not error, as it included malice as an element of manslaughter. It is the absence of this element which reduces the homicide to the lower grade of offense. The point that the court did not submit to the jury with sufficient clearness the law as to manslaughter and self-defense is not well taken. We have carefully read all the instructions on these points and find them to be a clear and fair statement of the law.

5. It is urged that instruction 28, given for the people, is an invasion of the province of the jury, and especially so because defendant was a witness in his own behalf. In this instruction the jury were told that they were the exclusive judges of the evidence and of the credibility of the witnesses and of the weight to be given to their testimony; and the court then proceeded to point out that as such judges of the evidence they "may consider the character and appearance of the witnesses, the consistency and reasonableness of their statements; the interest, if any, they may feel in the case, and from these and such reasons . . . may judge and determine as to the credibility, weight, effect, and sufficiency of such testimony." We perceive no invasion of the prerogative of the jury, as judges of the evidence, in this instruction. It does not fall within the rule in *People v. Van Ewan*, 111 Cal. 144, [43 Pac. 520], where the instruction was held error because pointing to the testimony of a particular witness. A similar instruction is found in *People v. Iams*, 57 Cal. 115, at pp. 122, 123, and although not specifically pointed out for approval, was included in the charge of the court, which, after careful examination, was said to have been "entirely correct."

The following instruction was given for the people: "If you entertain a reasonable doubt upon any one single material fact which is inconsistent with the defendant's guilt and arises from the evidence in this case, it is your duty to give the benefit of such doubt to the defendant and acquit him."

The criticism of this instruction is, that it dealt only with facts which are inconsistent with guilt, but does not include facts which are consistent with guilt, and is therefore erroneous and misleading. The court had just before instructed the jury fully as to the doctrine of reasonable doubt, and the court said, among other things: "The law presumes every man to be innocent until his guilt is established beyond all reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction." Elsewhere, at defendant's request, the court charged the jury: "If the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit." We cannot see that there was any failure of the

court to fully instruct the jury upon the point now presented; and it is quite apparent that the jury could not have been misled by the particular instruction complained of. Some other instructions are subjected to adverse comment by appellant, but they do not seem to us to call for particular notice.

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on September 1, 1905.

[No. 32. Third Appellate District.—July 3, 1905.]

G. W. CRYSTAL, Appellant, v. MRS. C. A. HUTTON,
Respondent.

JOINT NOTE—PAYMENT BY SURETY—OBLIGATION EXTINGUISHED—REMEDY AGAINST PRINCIPAL—STATUTE OF LIMITATIONS.—In this state one who signs a joint note as co-maker, but designating himself as surety, and who pays the note, thereby extinguishes its obligation, and his sole remedy against the principal maker is upon the implied obligation of the principal to reimburse him, which is barred in two years after such payment.

Id.—IMPROPER ACTION UPON NOTE—ASSIGNMENT BY HOLDER—PLEADING—OWNERSHIP—CONCLUSION OF LAW—DEMURRER.—The surety in such case cannot maintain an action upon the note by taking an assignment thereof from the holder after its extinguishment by payment; and a complaint by the surety on the note setting forth the facts shows on its face that the note is *functus officio*. The averment of ownership of the note is of a conclusion of law, and a demurrer to the complaint was properly sustained.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Horace G. Perry, and E. E. McFarland, for Appellant.

The surety was entitled to take an assignment of the obligation and hold it against the principal. (Civ. Code, sec.

2848; *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 531; *Clason v. Morris*, 10 Johns. 524; *New York State Bank v. Fletcher*, 5 Wend. 85; *Bullock v. Boyd*, 1 Hoff. Ch. 294; *Van Horne v. Everson*, 13 Barb. 526; *Goodyear v. Watson*, 14 Barb. 481; *Cuyler v. Ensworth*, 6 Paige, 32; *Edson v. Dillaye*, 17 N. Y. 158; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *Tutt v. Thornton*, 57 Tex. 35; *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226; *Williams v. Riehl*, 127 Cal. 369, 59 Pac. 762; *Lidderdale v. Robinson*, 2 Brock. 159, Fed. Cas. No. 8337; *Cottrell's Appeal*, 23 Pa. St. 294; *Brandt on Suretyship*, sec. 274; 3 *Pomeroy's Equity Jurisprudence*, sec. 1419, note 1; *Story's Equity Jurisprudence*, sec. 500.)

Coghlan, Harvey & Goodman, for Respondent.

Whatever the law may be elsewhere, in this state it is settled that the only remedy of the surety paying a just note is upon the implied obligation of the principal, which is barred in two years. (Civ. Code, sec. 1473; Code Civ. Proc., sec. 339; *Yule v. Bishop*, 133 Cal. 578, 579, 65 Pac. 1094, and cases therein cited.)

CHIPMAN, P. J.—Action by a surety against the principal on a promissory note.

Defendant pleaded, by demurrer, subdivision 1 of section 339 of the Code of Civil Procedure in bar of the action. The complaint was filed March 11, 1903. The demurrer was sustained, and plaintiff declining to amend his complaint, judgment passed for defendant, from which plaintiff appeals.

The complaint alleges that defendant, Mrs. Hutton, made her certain promissory note, which is set forth in *haec verba*. The note is dated March 12, 1898, and is payable to the order of H. C. Deakin twelve months after date, with interest at ten per cent, payable annually, and to be compounded, and is signed as follows: "Mrs. C. A. Hutton. G. W. Crystal, Surety." It is alleged in the complaint that on March 17, 1898, the note was duly indorsed to Mrs. C. Deakin; that plaintiff, at request of defendant, signed said note as surety and had no interest therein; that defendant refused and neglected to pay said note and interest when the same fell due, and plaintiff, as surety, was compelled to pay the same, and did pay, to Mrs. C. Deakin thereon the sum of \$2,360.10

on March 30, 1900, and "that thereupon, on said day, said Mrs. C. Deakin indorsed, assigned, and delivered said note to this plaintiff, and plaintiff ever since has been and now is the legal owner and holder thereof"; that no part of said sum of \$2,360.10 has been paid, and the whole thereof is due and unpaid. The prayer of the complaint is for the sum of \$2,360.10, with interest thereon from March 30, 1900, at the rate of ten per cent per annum, compounded annually.

1. It is contended by appellant that the action is founded upon a written instrument,—namely, the promissory note set out in the complaint,—and may be brought at any time within four years from its maturity. Respondent's contention is, that when the surety paid the original obligation,—namely, the promissory note,—it became extinguished, and no action could be maintained upon it, and that the action of the surety in such case is upon an implied promise of the principal to reimburse the surety, and is not an obligation in writing, and was therefore barred in two years from the time the surety paid the note.

Appellant relies upon the provisions of sections 2848 and 2849 of the Civil Code, which gives to a surety, upon satisfying the obligation of the principal, the right "to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended," etc. He also contends that section 1473 of the Civil Code, which provides that "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it," does not apply to sureties. It is urged that effect must be given to section 2849, in considering these two sections together, because this section is a special law, while section 1473 is a general law, and the latter must give way to the former.

Appellant's attorneys appear to have made a very careful study of the history of these provisions of the code, tracing their origin to the New York code, and they show by decisions of the courts of that state that apparently the construction contended for by appellant is there held to be the correct one, and that the rule of law respecting the rights of a surety is as appellant urges should be the rule here. Cases are also cited from other states holding in consonance with the rule said to

be enforced in the New York courts. Two cases from our own supreme court are cited as supporting appellant,—namely, *Waldrip v. Black*, 74 Cal. 409, [16 Pac. 226], and *Williams v. Riehl*, 127 Cal. 365, [78 Am. St. Rep. 60, 59 Pac. 762]. If the question were *res integra* in this state, we should feel called upon to give it a searching examination, for the courts have differed widely and are far from agreement upon it. However the question may be regarded elsewhere, we think the rule firmly settled in this state that payment by the surety of the obligation evidenced by a promissory note under the circumstances shown in the complaint extinguishes the obligation, and that the remedy given the surety in such case is upon the implied obligation of the principal debtor to reimburse the surety “what he has expended.” The cases which more or less sustain this rule are the following: *Chipman v. Merrill*, 20 Cal. 131; *Gordon v. Wansey*, 21 Cal. 77; *Moran v. Abbey*, 58 Cal. 163; *Wright v. Mix*, 76 Cal. 465 [18 Pac. 645]; *Stone v. Hammell* 83 Cal. 547, [17 Am. St. Rep. 272, 23 Pac. 703]; *James v. Yaeger*, 86 Cal. 184, [24 Pac. 1005]; *Stanley v. McElrath*, 86 Cal. 449, [24 Pac. 16]; *Pleasant v. Samuels*, 114 Cal. 34, [45 Pac. 998]; *Yule v. Bishop*, 133 Cal. 574, [65 Pac. 1094]; *Loewenthal v. Coonan*, 135 Cal. 381, [87 Am. St. Rep. 115, 67 Pac. 324]. The question had careful consideration in *Yule v. Bishop*, as indeed in other cases above cited, and after reviewing the cases it was there said: “In this state, therefore, it seems to be well settled, both by the language of the code and by the decisions of this court under it, that full payment and performance by the surety extinguishes the primary obligation; that new rights and liabilities then arise—upon the part of the principal, to reimburse the sureties for the moneys expended, with legal interest, though not according to the terms of the primary obligation; and upon the part of the surety, the right to an action in *assumpsit* upon the implied promise of the principal to make him whole. Since the principal obligation is thus extinguished, it cannot be with us as it may be elsewhere, that the original obligation is kept alive and passes to the surety by equitable assignment or subrogation.”

This case was reconsidered on petition and the Department decision was approved. There is nothing in the dissenting opinion of Mr. Justice Harrison which necessarily contra-

venes the majority opinion. Furthermore, in *Loewenthal v. Coonan*, 135 Cal. 381, [87 Am. St. Rep. 115, 67 Pac. 324], which was decided subsequently to *Yule v. Bishop*, Mr. Justice Van Dyke, who concurred in the dissenting opinion just referred to, speaking for the court, held to the rule laid down in *Yule v. Bishop*, and with him concurred Mr. Justice Harrison; and a rehearing in that case was denied.

In *Waldrip v. Black*, 74 Cal. 409, [16 Pac. 226], relied on by appellant, there are expressions used in the opinion which seemingly support appellant, but they must be considered in connection with the facts in the case, or, otherwise, they must be held to give way to the well-considered rule which has withstood all attacks in our supreme court for over forty years, though repeatedly assailed. In *Waldrip v. Black* the action was by the surety to foreclose the mortgage given to secure the note of the principal, which the surety paid after maturity and which was thereupon indorsed to him. It does not appear from the opinion what were the grounds for the appeal. No question of the statute of limitations arose, and the rule there stated, that the surety "became the equitable assignee of the note, it being the principal undertaking, and entitled to enforce its payment according to its tenor and effect, as the holder thereof, as well as to foreclose the mortgage, which was the collateral security," might apply upon equitable principles to enable foreclosure by the surety; it might be his only adequate means of reimbursement—as, for example, in case of the insolvency of the maker of the note. However this may be, the case cannot be regarded as in the slightest degree weakening the position taken by the court in those cases where the question was presented as we now have it. *Waldrip v. Black* was a case where all the facts of the transaction were set out, and, under our system of pleading, as was said in *Yule v. Bishop*, "it can make little difference in the generality of cases whether it be said that an accommodation maker or indorser who has been compelled to meet the obligation of his principal is entitled to sue upon the note, with a recovery limited to the amount which he has expended, with legal interest, or whether it be said that his action is in *assumpsit* for money laid out on behalf of his principal." But in the present case it is of vital consequence to defendant that he have the benefit of the correct

rule of law applied. The case of *Williams v. Riehl*, 127 Cal. 365, [78 Am. St. Rep. 60, 59 Pac. 762], cited by appellant, does not, in our opinion, in any wise weaken the force of the cases previously and subsequently decided by the court.

2. It is further contended that the demurrer should have been overruled because there is a cause of action stated independently of the allegations as to suretyship. The contention is grounded on the allegation that Mrs. Deakin assigned the note to plaintiff, and that plaintiff ever since has been, and is now, the owner and holder thereof, and that the note has not since been paid. It clearly appears that plaintiff had paid the note before it was assigned to him. The note thereupon became *functus officio*, and was not revived by the assignment to plaintiff, who took the note with knowledge of all the facts (*Gordon v. Wansey*, 21 Cal. 77); by payment to the payee, "the note became extinct and ceases to be a binding obligation." (*James v. Yaeger*, 86 Cal. 184, [24 Pac. 1005].)

We have not here, as is contended, the statement of two causes of action improperly united, one of which may be good as against the demurrer pleading the statute of limitations only. We have the case where the pleader alleges ownership, but in doing so alleges facts as to how he became such owner which are inseparable from the assertion of ownership. Indeed, in view of the facts stated as to how he became the owner and holder, the latter allegation is rather a conclusion of law than a statement of fact. By his own showing he became the owner and holder of a piece of paper which had ceased any longer to be the existing enforceable obligation of anybody. The complaint is constructed wholly upon the erroneous theory contended for by appellant that he had the same right to sue upon the note precisely as any innocent indorsee for value would have had.

The judgment is affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 10. Second Appellate District.—July 5, 1905.]

J. F. HUMPHREYS, Respondent, v. **JOHN FLETCHER MOULTON et al.**, Appellants.

NUISANCE—FLOODING OF LANDS BY SURFACE WATER—FINDINGS.—In an action for damages, and to enjoin the continuance of an alleged nuisance, in flooding of plaintiff's lands by surface water, where the ultimate finding for plaintiff, sustained by the evidence, is that there were two or more channels or waterways and that all these were brought together into the channel complained of, the plaintiff is entitled to recover, regardless of whether other immaterial findings are or are not supported by the evidence.

ID.—EVIDENCE—IMMATERIAL FINDINGS.—Findings upon evidence which could have no effect upon the result are not material.

ID.—DEFINITENESS OF JUDGMENT—ABATEMENT OF NUISANCE—ALTERNATIVE PROVISION.—A judgment that the defendants abate the nuisance by removing the embankment or dike made by them, and filling up the ditch to its former level, and that they be enjoined from its further continuance, but also providing, as an alternative, that they may make other suitable provision for the care of storm waters so that no greater portion of storm waters will flow on to plaintiff's lands than before the defendants made the changes on their lands, is as definite as it is practicable to make it.

APPEAL from a judgment of the Superior Court of Riverside County and from an order denying a new trial. **J. S. Noyes**, Judge.

The facts are stated in the opinion of the court.

Collier & Carnahan, and **O. P. Widaman**, for Appellants.

Purington & Adair, for Respondent.

SMITH, J.—The suit was brought to recover damages to the plaintiff's land, caused by the act of the defendants in collecting into a single channel the surface waters flowing over the defendants' lands in time of rain, and thereby discharging the aggregate volume of water upon plaintiff's land, to the damage of plaintiff, etc. Judgment was rendered for the plaintiff for damages, and also for an injunction. The appeal is from the judgment and from an order denying the defendants' motion for a new trial.

The plaintiff's land lies below the canal of the Riverside Land Company and some distance to the north therefrom. The defendants own the land intervening between plaintiff's land and the canal, and also lands to the south of the canal extending up into a valley or ravine in the hills, along which there lies a dry channel or waterway; which, it is found by the court, at a point described as the southern end of the lot of the defendants, known as lot 21, divides itself into three channels, one running along the west and the other along the east boundary of that lot, and the third over the intervening space.

The waterway along the east boundary of the lot is found by the court to be the main branch or wash, and its general course to its point of discharge is described in detail; and this is true also of the waterway on the west side of the lot as it was in its natural condition; and it is urged by the appellants that these findings are in some particulars not justified by the evidence. But with regard to each of the findings objected to the evidence seems to be conflicting, and, at all events, the findings seem to be immaterial. For the ultimate finding is, that there were two or more channels or waterways, and that all of these were brought together into the channel complained of; and this finding is not attacked, nor indeed under the evidence could it be. And upon these facts, under a long line of decisions in this state, it must be held that the plaintiff was entitled to recover. (*Ogburn v. Connor*, 46 Cal. 350, [13 Am. Rep. 213]; *Lamb v. Reclamation Dist.*, 73 Cal. 125, [2 Am. St. Rep. 775, 14 Pac. 625]; *McDaniel v. Cummings*, 83 Cal. 519, [23 Pac. 795]; *Gray v. McWilliams*, 98 Cal. 163, [35 Am. St. Rep. 163, 32 Pac. 976]; *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 467, [37 Pac. 375]; *Rudel v. Los Angeles County*, 118 Cal. 288, [50 Pac. 400]; *Cushing v. Pires*, 124 Cal. 665, [57 Pac. 572]; *Larrabee v. Cloverdale*, 131 Cal. 99, [63 Pac. 143].)

Other points made by the appellants are: 1. The refusal of the court to admit "a topographical sheet of the United States geological survey" covering the locality in controversy; 2. The admission of the plat put in evidence by the plaintiff; and 3. The indefinite character of the judgment with reference to the injunction adjudged. As to the first two of these, it is by no means clear that any error was committed; but if

there was, the admission of the evidence in the one case, or its exclusion in the other, could have had no effect upon the result. As to the last point, we think the judgment is as definite as it was practicable to make it. Nor does the objection urged to it by the appellants apply. It is, indeed, adjudged, that the defendants abate the nuisance by removing the embankment or dike made by them and filling up the ditch to its former level, and that they be enjoined from a further continuance of said embankment and ditch in its present condition. But it is also provided that, "the said defendants, as an alternative for the doing of said acts, may make such other suitable and proper provision for the care of the storm waters which naturally reach the southerly end of said lot 21 as that no greater portion of said storm waters will flow onto the lands of plaintiff than flowed thereon before the defendants made the aforesaid changes on their lands."

The judgment and order are affirmed.

Allen, J., and Gray, P. J., concurred.

[No. 45. Third Appellate District.—July 5. 1905.]

SARAH C. HAYDEN, Incompetent, by A. L. Westing,
Guardian, Respondent, v. F. H. COLLINS, Appellant.

EJECTMENT AGAINST TENANT AT WILL—TERMINATION OF TENANCY—

NOTICE TO QUIT—REFUSAL TO SURRENDER POSSESSION—UNLAWFUL DETAINER.—A complaint alleging plaintiff's ownership and right of possession of the premises described, that a tenancy at will of the defendant had been determined by notice, and that defendant after three days from the notice to quit refused to quit the premises, and still occupies the same, and stating the rental value of the premises, and praying for restitution thereof, for treble damages, and for costs, states a cause of action in ejectment and for relief which may be granted in such action; and it is immaterial in the absence of any ambiguity or uncertainty that the facts stated may also show a cause of action in unlawful detainer.

Id.—ISSUES AS TO TITLE—FINDINGS AND JUDGMENT—UNTENABLE OBJECTION.—Where defendant took issue upon plaintiff's ownership and right of possession and set up title in himself, the issues were properly involved and tried in the action of ejectment; and

where findings and judgment thereupon were in favor of plaintiff, the objection of defendant that title could not be tried or found in an action of unlawful detainer must be deemed inapplicable.

ID.—DEED FROM PLAINTIFF TO DEFENDANT—DELIVERY ESSENTIAL TO TITLE—INSUFFICIENT ESCROW—TESTAMENTARY DISPOSITION.—Conceding that a deed from plaintiff to defendant was sufficient in form, it did not pass title where there was no delivery with that intent. A delivery in escrow was not sufficient where it was not irrevocable, and the deed was not intended to take effect until after her death, and was in fact revoked by her, and when last seen was found in her possession. The law does not allow a testamentary disposition by deed.

ID.—AGREEMENT TO DEVISE PROPERTY—INSUFFICIENT PROOF.—An agreement to devise property from plaintiff to the defendant must be established by clear and convincing evidence; and where the evidence is vague and unsatisfactory as to the terms of any agreement, and does not show a meeting of minds on any definite proposition, and shows that everything was dependent upon the plaintiff's will, and that defendant did not perform the expected services, equity cannot protect the defendant in possession by enforcing an agreement to devise.

ID.—POSSESSION BY PERMISSION—TENANCY AT WILL.—Where the defendant entered into the possession of the property of plaintiff by her permission, without valid agreement or transfer of title, he became a tenant at will of the plaintiff.

ID.—MOTIVES OR DESIRES OF GUARDIAN—CONVERSATIONS INADMISSIBLE.—The motives of the guardian and what he believed and desired were immaterial; and conversations between the guardian and the defendant and his wife were inadmissible, where it appears that the guardian had never talked with his ward about the matter in controversy, and knew nothing concerning it.

APPEAL from a judgment of the Superior Court of San Joaquin County. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

Nicol & Orr, and E. P. Foltz, for Respondent.

McLAUGHLIN, J.—This action was brought to recover the possession of certain real property in the city of Stockton. The complaint was filed May 23, 1903, and the following facts are therein aptly and sufficiently stated: 1. The due appointment and qualification of the guardian; 2. That the action was brought in behalf of the incompetent; 3. "That said

Sarah C. Hayden is, and was at all times herein mentioned, the owner, and is now entitled to the possession of the premises"; 4. That on September 24, 1901, defendant "became a tenant at will of said premises," and "that he was at all times herein mentioned, and now is in possession thereof"; 5. That on April 2, 1903, said defendant was served with a notice in writing, signed by said incompetent, by her said guardian, requiring said defendant to quit said premises, and to deliver up possession of the same on or before May 3, 1903; 6. That on May 19, 1903, defendant was served with a similar notice, requiring him to quit and deliver up possession of said premises within three days after such notice; 7. "That said defendant has refused and neglected and still refuses and neglects to quit said premises, and still occupies the same"; 8. That the monthly rental value of the property is fifteen dollars. The prayer was for restitution of the premises, for treble damages, and costs of suit.

The demurrer was properly overruled. The arguments of counsel and the authorities cited, go to the sufficiency of the pleading as a *complaint in forcible entry and detainer, or unlawful detainer*. We are not concerned with technical questions as to the proper *designation* of an action. It is for us to determine whether the complaint states *any* cause of action entitling the plaintiff to *any* relief at law or in equity. (*Reiner v. Schroeder*, 146 Cal. 411, [80 Pac. 517]; *Rogers v. Duhart*, 97 Cal. 505, [32 Pac. 570]; *Grain v. Aldrich*, 38 Cal. 521, [99 Am. Dec. 423]; *Walsh v. McKeen*, 75 Cal. 522, [17 Pac. 673].) In the complaint before us it is alleged that plaintiff is the *owner* and *entitled to the possession* of the premises; that the tenancy at will had been determined; and that defendant, after due notice, *refused to surrender possession*, and remained in the occupancy of said premises. These averments state a cause of action *in ejectment*, and the prayer is for the relief which may be granted in such an action. (Civ. Code, sec. 3345; *McKissick v. Ashby*, 98 Cal. 424, [33 Pac. 729]; *Wise v. Eveland*, 134 Cal. 617, [66 Pac. 1082]; *Holloway v. Galliac*, 47 Cal. 476; *Payne v. Treadwell*, 116 Cal. 243; *McCarthy v. Yale*, 39 Cal. 586; *Moore v. Morrow*, 28 Cal. 554.) In the absence of any ambiguity or uncertainty it is no objection that the facts stated may also show a cause of action in unlawful detainer, or, mayhap, to

quiet title. (*Adams v. Helbing*, 107 Cal. 302, [40 Pac. 422]; *Brison v. Brison*, 90 Cal. 329, [27 Pac. 186].)

The defendant, answering, denied that plaintiff was the owner, or entitled to possession, and set up title in himself, under a conveyance executed by the incompetent August 24, 1902. He also claimed under an agreement to convey and make testamentary disposition to him of this and other property. The agreement so pleaded was considered by this court in another proceeding between the same parties, and it is, therefore, unnecessary to give its terms here. (See *Estate of Hayden, ante*, p. 75.) The cause was tried without a jury, and the court found in accordance with the averments of the complaint and against the averments contained in the answer. Judgment was entered decreeing that plaintiff have and recover possession with fifteen dollars damages and costs. The judgment also recited that the plaintiff was entitled to a writ of possession. From this judgment the plaintiff appeals upon a bill of exceptions. It is first contended that the court erred in admitting evidence pertinent to, and finding on, the question of ownership. This contention is based on the proposition that the title is not involved, and that evidence to show ownership is not admissible in actions of forcible entry and detainer or unlawful detainer. Conceding the premise, the conclusion does not follow. Title and right of possession are certainly involved in the case at bar. The parties made the issues, and the court could not limit the scope of the inquiry nor refuse to find on questions so clearly in dispute.

We have seen that the pleadings presented a case in ejectment, and no matter what the action might be styled or called, the court was compelled to admit the evidence and find on the issues so pointedly presented for trial and decision. (*Marshall v. Shafter*, 32 Cal. 176; *McCarthy v. Brown*, 113 Cal. 18, [45 Pac. 14]; *Eva v. Symons*, 145 Cal. 202, [78 Pac. 648]; *Nuttall v. Lovejoy*, 90 Cal. 167, [27 Pac. 69]; *Estate of Toomes*, 54 Cal. 517, [35 Am. St. Rep. 83].) The case was evidently tried on the theory that title and right of possession were both involved, for the next contention of appellant to be noticed is, that the finding that plaintiff owns the property is not sustained by the evidence. This point is so intimately connected with assaults on the findings touching

the deed and agreement relied upon by appellant that all of these questions will be considered together. It is claimed that the evidence shows title and right of possession in appellant. This contention rests on the assumption that the existence and validity of both the deed and agreement were established. It seems to be admitted that the title is in plaintiff, unless it passed under one or the other of these alleged transfers or contracts.

The evidence relating to the execution of and property conveyed in the deed is far from satisfactory. But, granting that it was sufficient in form and substance, still it could not and did not pass title. Delivery with intent to pass title is essential to a valid conveyance of real property. (*Black v. Sharkey*, 104 Cal. 280, [37 Pac. 939]; *Kenney v. Parks*, 137 Cal. 531, [70 Pac. 556].) Appellant admits that the deed was never delivered to him, but seems to rely on a delivery in escrow. But it is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, *beyond any power in the grantor to recall or revoke it*. The grantor must clearly and unequivocally evidence an intent and purpose to *part with the possession and control of the deed* for all time. In short, the delivery and transfer must be *irrevocable*. (*Bury v. Young*, 98 Cal. 446, [35 Am. St. Rep. 186, 33 Pac. 338]; *Kenney v. Parks*, 125 Cal. 146, [57 Pac. 772]; *Wittenbrock v. Cass*, 110 Cal. 1, [42 Pac. 300].) Such was not the case here. The lawyer who drew the deed, and who says he held it to be delivered on the death of the grantor, could not remember anything Mrs. Hayden said touching this point so vital to the validity of an escrow. *He* evidently did not understand that it had been delivered to him beyond any power of recall, for he gave it to the grantor with other papers in his possession, *upon her request*, and apparently *without protest or question*. Mrs. Hayden certainly understood that it was under her control, for she *did recall it* and when last seen it was *in her possession*. Then there is another salient fact, not only pointing to the intent and purpose of the grantor, but showing the utter impotency of this alleged conveyance. The lawyer does remember that it was distinctly understood that the deed was not to *take effect until after Mrs. Hayden's death*. This clearly shows that there could have been no such delivery as is requisite to the validity of any deed. If that

deed was not effective as a conveyance during the life of the grantor, it could not become quick with life the moment she died. If delivery with intent to pass title was not accomplished in life, it certainly could not be accomplished after death. When annihilation as to this world and its concerns comes upon a person, all power to act is gone, and it is the wise policy of the law to frown upon any attempt to retain in eternity the power over property enjoyed in life. The law does not allow a testamentary disposition *by deed*. The deed which falls from the hands palsied by death is void, and equally void is any deed which remains under the control of the grantor until the cord of such control is severed by the final call. The essential element of delivery while power to deliver remains cannot be dispensed with. If the title does not vest when the deed is delivered, it does not vest at all.

The undisputed evidence shows that this was never intended, and therefore if the deed was ever made it did not pass title. It seems clear, however, that no agreement to make testamentary disposition of this or any other property was shown. Such agreements must be established by clear and convincing evidence. The services to be performed by the beneficiary must be such that they cannot be adequately compensated in money, and they must be fully performed by such beneficiary before full performance can be enforced. (*Owens v. McNally*, 113 Cal. 451 [45 Pac. 710]; *McCabe v. Healy*, 138 Cal. 86, [70 Pac. 1008].) The evidence here is vague and unsatisfactory. Appellant seems to be at sea touching its most essential terms. He is sure that he was to get certain property, but whether he was to get title by present conveyance, by parol gift, by deed in escrow, or by will, is more than he can say. A thorough analysis and study of the evidence convinces us that nothing was said or done to indicate an *agreement*. There was no meeting of minds on any definite proposition made by any of the parties. Nothing is indicated more than that Mrs. Hayden at one time, probably intended to remember appellant in her will, or "do something for him." He came there at her request and lived with her. He had her house, rent free, the use of wood furnished from her property, and pursued the even tenor of his way, working at his trade most of the time. In fact, it seems that he went about his business in the usual way and devoted

but little time to her or her concerns. True, he boarded her for a time, but it seems that he kept an account against her for articles furnished. We are left groping touching the causes which induced a change, but it appears that about February 1, 1903, Mrs. Hayden employed a servant who waited upon her, and cooked for her employer and herself. Mrs. Hayden paid for the provisions and paid the servant. This and more is gleaned from his evidence, and from the same source we derive the knowledge that she was to give him the property *if she wanted to*, that everything was *dependent on her will*.

From the foregoing it is apparent that there was no agreement, and that if there was he failed in the performance thereof. But conceding that such an agreement existed, we have been cited to no law giving countenance to the proposition that an agreement of this kind could operate to deprive the incompetent of her property, or any rights pertaining thereto, *during her lifetime*. Equity will enforce the full performance of such contracts, where the beneficiary has fully performed his part of the agreement. But it will never compel performance by one party when there can be no certainty that the other party even intends to carry out the promises made by him. To tie up her property and deprive her of its enjoyment and use, while he remained free to do as he pleased, would be intolerable. (*O'Brien v. Perry*, 130 Cal. 528, [62 Pac. 927]; Civ. Code, sec. 3390.) Equality is equity, and there could be no equality of benefits or burdens if onerous restrictions were imposed upon one party to the agreement, while the other could perform or repudiate according to his pleasure, interest, or whim.

From the negative pregnant in the answer, aided by the decree of distribution introduced in evidence, it follows that the title was in Mrs. Hayden; and this, coupled with the above considerations as to the invalidity of both deed and agreement, points to the conclusion that the findings relating to ownership, possession, and the agreement are fully sustained by the evidence. The appellant entered and remained in possession by permission of the owner. This made him a tenant at will. (*Jones v. Shay*, 50 Cal. 509; Wood on Landlord and Tenant, p. 48.) The appellant did not deny that the notices to quit were served. His denial went only to the fact that Mrs. Hayden did not *herself* sign the notices.

We regard the other findings and all evidence relating to them as entirely immaterial. The motives of the guardian, what he believed or desired, had nothing whatever to do with the issues to be tried. There could be no prejudicial error if the findings and rulings in this regard were all wrong. (*Clavey v. Lord*, 87 Cal. 421, [25 Pac. 493]; *Costa v. Silva*, 127 Cal. 354, [59 Pac. 695]; *Grimbley v. Harrold*, 125 Cal. 31, [73 Am. St. Rep. 19, 57 Pac. 558]; *Corker v. Corker*, 87 Cal. 651, [25 Pac. 922].) The rulings on evidence relating to the execution and contents of the alleged deed were more than liberal to appellant; no doubtful question as to the admissibility of such evidence was resolved against him. The conversations between the guardian and Mr. and Mrs. Collins concerning the agreement were inadmissible. The self-serving declarations of either husband or wife would be plainly irrelevant, and if they were against appellant's interest the rulings were not prejudicial. The guardian had testified that he had never talked with Mrs. Hayden about the matter and knew nothing concerning it. It is obvious from this that anything he might say could not deprive his ward of her property or rights. The other rulings on evidence were so clearly right that it could serve no good or useful purpose to dwell upon them.

The judgment is affirmed.

Buckles, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on September 1, 1905.

[No. 29. Third Appellate District.—July 5, 1905.]

J. J. BUHMAN, JR., et al., Appellants, v. NICKELS & BROWN BROS., a Corporation, Respondent.

UNLAWFUL DETAINER—EXECUTORS' SALE OF LEASED PROPERTY—INEFFECTUAL APPEAL FROM CONFIRMATION—DEMURRER TO ANSWER.—Where the complaint in unlawful detainer states a cause of action in favor of plaintiffs as purchasers of the leased property at

executors' sale confirmed to them, an answer not denying its averments, and merely pleading a sale to the defendant and a pending appeal by defendants from the order of confirmation to plaintiffs, which it shows to be ineffectual for failure to file the undertaking in time, states no defense, and a demurrer thereto was improperly overruled.

ID.—TERMINATION OF TENANCY—NOTICE—STIPULATION IN LEASE—

Where the lease expressly stipulated that in case of sale of the leased premises the lessee would quit and surrender the said premises upon thirty days' written notice, when the notice stipulated was given the defendant could not prevent the lease from lapsing, and no further notice of three days was required to sustain an action for unlawful detainer.

ID.—REHEARING—AMENDMENT OF MISTAKE IN ANSWER—EFFECTIVENESS

OF APPEAL—POINT NOT URGED ON HEARING—PROTECTION OF RESPONDENT.—A rehearing will not be granted to allow respondent to amend the record by showing a mistake in the preparation of the answer as to the effectiveness of the appeal therein pleaded from the order confirming the sale to plaintiffs, where no such point was made or suggested on the hearing, and no notice was taken by respondent of appellants' argument upon the ineffectiveness of the appeal, and where such amendment would involve an amendment of the answer of which respondent may avail himself in the trial court. The ruling adhered to by this court will not prevent the respondent from taking every advantage which his appeal may in fact give him.

APPEAL from a judgment of the Superior Court of Napa County. H. C. Gesford, Judge.

The facts are stated in the opinion of the court.

Weber & Rutherford, for Appellants.

Bell, York & Bell, for Respondent.

McLAUGHLIN, J.—Unlawful detainer. The complaint contains allegations showing that the executors of the last will of Charles Robinson, deceased, leased certain real property of the estate in Napa County to the defendant corporation, and that the defendant went into possession under said lease. That the lease contained the following covenant: "It is further mutually understood and agreed by the parties hereto, that in case of a sale of the demised premises that the said second party will *quit and surrender the said premises upon 30 days'* written notice, and the said first parties will

pay to the said second party the actual cost or expense that said second party may have been put to in putting any crop of hay or grain upon said premises." That the will of Robinson, deceased, authorized and empowered the executors to sell any property of the estate, without order or notice, at public or private sale. That under said power the executors sold the leased land to plaintiffs, at private sale, on October 15, 1902. That said sale was reported to the superior court on November 26, 1902, and on December 30, 1902, an order confirming the sale was made and entered. That pursuant to said sale a deed was executed by the executors on said last-mentioned day, which deed was delivered to plaintiffs on January 29, 1903, and that ever since said date they have been the owners of the premises. That on the fourth day of February, 1903, plaintiffs served upon defendant a written notice stating that the property had been sold to plaintiffs, and demanding that said defendant quit and surrender possession of said premises within thirty days from the date of said service. That on February 12th following a notice was served by plaintiffs upon defendant demanding that defendant furnish plaintiffs with a statement of the actual cost or expense that defendant had been put to in putting in a crop of hay and grain. That on March 6, 1903, plaintiffs served upon defendant an offer in writing to pay defendant for putting forty acres into hay and grain at a cost of four dollars per acre. That defendant failed to furnish a statement of cost and expense as requested, or to accept the offer so made, and remained in possession and occupancy of the premises and refused to quit or surrender possession of the same. Then followed an averment that the acreage put into hay and grain amounted "*to about forty acres*, and that the actual cost or expense that defendant was or has been put to in putting in said crop of hay or grain *does not exceed \$4.00 per acre.*" Plaintiffs then further alleged that the *value of the rents and profits was five hundred dollars per month.* The prayer was for restitution of the premises, for the value of the rents and profits trebled, and for costs. Attached to and made a part of the complaint was a copy of the lease in which the monthly rental is fixed at fifty dollars from January to July and twenty-five dollars for the remainder of the year. Defendant, answering, alleged, in substance, that the executors had sold the land to defendant, and that, as such

purchaser, defendant had contested the confirmation of the sale to plaintiffs, and had taken an appeal from the order confirming said sale, which appeal was then pending. It appears from the averments of the answer that the notice of appeal was served on January 12, 1903, and that the undertaking on appeal was not filed until January 19, 1903, *seven* days after the notice of appeal was served. The pendency of the appeal was the only defensive matter pleaded in the answer, and none of the averments of the complaint were denied therein. To such answer the plaintiffs demurred upon the ground that it did not state facts sufficient to constitute a defense to the action. The court overruled the demurrer, and such ruling is assigned as error. The undertaking on appeal not having been filed within five days after the notice of appeal was served, the appeal was ineffectual for any purpose. (Code Civ. Proc., sec. 940; *San Francisco Law and Collection Co. v. State*, 141 Cal. 358, [74 Pac. 1047]; *Hoyt v. Stark*, 134 Cal. 179, [86 Am. St. Rep. 246, 66 Pac. 223]; *Robinson v. Templar Lodge*, 114 Cal. 41, [45 Pac. 998]; *Reed v. Kimball*, 52 Cal. 325.) The order overruling the demurrer was, therefore, erroneous. The respondent, however, claims that such error was not prejudicial, and that upon the findings, which are identical with the averments of the complaint and answer, the judgment should be for defendant in any event. This contention is based upon the proposition that the notice to quit and surrender possession given pursuant to the terms of the lease merely terminated the lease, and hence a further notice styled a "three days' notice to quit" was essential before an action in unlawful detainer would lie. The covenant in the lease was that the defendant would "quit and surrender possession upon 30 days' notice." The law neither does nor requires an idle act, and it would certainly be idle to require three days' notice to quit, in view of the express stipulation of the parties and plaintiffs' compliance therewith. The defendant could not, by any act or acts, prevent the lease from lapsing, and under such conditions no further notice was required. (Code Civ. Proc., sec. 1161; *Harloe v. Lambie*, 132 Cal. 135, [64 Pac. 88]; *Earl Fruit Co. v. Fava*, 138 Cal. 76, [70 Pac. 1073]; *Kelly v. Teague*, 63 Cal. 68.) Besides, a reasonable construction of the lease leads to the conclusion that the parties understood and intended that a sale would

terminate the lease, and that in such event thirty instead of three days' notice to quit would be necessary. It results that the complaint did state a cause of action, and that the findings in accordance with such complaint would not support, much less authorize, a judgment for defendant.

Appellants ask that the trial court be directed to enter judgment upon the findings according to the prayer of the complaint. This cannot be done. The lease shows the rental value which may be trebled (Civ. Code, sec. 3345; Code Civ. Proc., sec. 1174), and the prayer is according to the general averment as to the value of rents and profits. Damages in such actions as the one at bar must be fixed in accordance with rules of law. (Civ. Code, secs. 3334, 3345; Code Civ. Proc., sec. 1174; *Jack v. Sinsheimer*, 125 Cal. 566, [58 Pac. 130].) And it is obvious from an inspection of the complaint and prayer that it would be disregarding these rules to award the amount asked in the prayer. The defendant, under the complaint, is also entitled to have his expense and cost of putting in crops of hay and grain ascertained. This cannot be done when the averment is as indefinite as it is in this case, for "about forty acres at a cost of not to exceed four dollars per acre" would be an uncertain basis upon which to rest the measure of defendant's right.

The judgment is reversed.

Buckles, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 1, 1905, and the following opinion was rendered thereon:—

CHIPMAN, P. J.—The petition for a rehearing is denied.

This court on July 5, 1905, reversed the judgment which was rendered by the trial court in favor of defendant. Defendant now asks a rehearing on the ground that its answer erroneously alleged that the notice of appeal from the order confirming the sale of the real property in question was filed on January 12, 1903, when, in fact, it was not filed until January 19, 1903, on which day, also, the undertaking was filed. As the record stood when the cause was submitted here, it appeared by the answer that the undertaking was not

filed five days after the notice of appeal was served, and, hence, as we held, the appeal was ineffectual for any purpose.

In appellant's brief the point was distinctly made and attention was specifically drawn to the allegations of the answer, and numerous cases were cited in support of the point. Respondent took no notice of the matter, and in its brief made no suggestion that there was any clerical or other error in the date given for the service of said notice of appeal, but relied wholly on its demurrer to the complaint.

The supreme court has denied rehearing in numerous cases (but few of which are reported), where points made in the briefs have been waived or presumably confessed, by failure to argue or notice them, and afterwards the losing party has sought to have the same points heard by petition for a rehearing. (See *Atherton v. Board of Supervisors*, 48 Cal. 157; *Dougherty v. Henarie*, 49 Cal. 686; *People v. Northey*, 77 Cal. 618. [19 Pac. 865, 20 Pac. 129].)

In the present case the court had every reason for assuming that the facts were as stated in the answer, and we do not think the defendant should be permitted to have a rehearing for the purpose of correcting the record after having deliberately ignored the matter when its attention was called to it. Furthermore, it is not claimed that the answer as printed in the record is other than the answer served and filed; the claim is that a mistake occurred in its preparation, and thus we are asked in effect to permit an amendment of the pleadings, which we doubt our right to do. We have less hesitancy in denying in view of the fact that defendant still has the opportunity to fully protect its rights in the trial court. The ruling of this court as to the appeal pleaded in the answer will not prevent the defendant from obtaining every advantage which his appeal may give him.

Upon the remaining questions discussed in the opinion on file we adhere to the views there expressed.

Buckles, J., and McLaughlin, J., concurred.

[No. 26. Second Appellate District.—July 6, 1905.]

A. L. CARPENTER et al., Appellants, v. MAUD RICE
IBBETSON et al., Respondents.

**BUILDING CONTRACT—SUBSTANTIAL COMPLIANCE—INDEPENDENT PROMISE
—DEFECTS IN STAIRWAY—MEASURE OF DAMAGES—IMPROPER EVIDENCE—COST OF NEW STAIRWAY.**—In an action against the owners of a building by contractors to recover the balance due on the contract, and for extra work, where plaintiffs had substantially complied with the contract, which contained an independent promise to pay before the commencement of the work, and where it appeared that alleged defects in a stairway could be remedied at moderate cost, the measure of damages therefor is merely the detriment suffered from breach of the contract. It was error for the court to admit evidence of the cost of a new stairway, and to render judgment therefor, as a measure of damages against the plaintiffs.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Borden & Carhart, for Appellants.

Where there is a substantial compliance with the contract, the contractor may recover on the contract less detriment proximately caused by a breach of the contract. (Civ. Code, sec. 3300; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Perry v. Quackenbush*, 105 Cal. 307, 308, 38 Pac. 740; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Harlan v. Stuffebeem*, 87 Cal. 508, 25 Pac. 686; *Katz v. Bedford*, 77 Cal. 322, 19 Pac. 523; *Swain v. Seamans*, 9 Wall. 257, 274; *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470, 479, and note.)

Isidore B. Dockweiler, for Respondents.

The evidence was admissible to show that a new stairway was required to remedy the defects therein, and any evidence to the contrary is conflicting and not subject to review.

SMITH, J.—Appeal from a judgment for the defendants and from an order denying the plaintiffs' motion for a new

trial. The suit was brought on a written agreement of the plaintiffs with defendants to furnish all inside mill work for a building on defendants' premises, as per detail then in their possession, among which the following appear in the specifications: "All interior finish, etc., to be constructed of selected, even-colored and even-grained, kiln-dried lumber of the several kinds specified, all to be neatly hand smoothed, scraped and sandpapered to perfect, smooth, even finish, no tool or sandpaper marks to be left on same. All oak finish and finish in dining-room below architrave to be secret nailed. Balusters (of the main stairs) to be . . . glued into steps and glued into rail"; the contract price of one thousand dollars to be paid before the commencement of the work.

The complaint alleges a completion of the work in accordance with the terms of the contract, and that plaintiffs had been paid on the contract price the sum of nine hundred dollars, leaving unpaid—with allowance for the omission of certain work by agreement—the sum of \$94.75, with interest; and that there is now a balance due and owing on the contract of that amount, with interest, etc. It is further alleged that extra work, described in separate paragraphs of the complaint, was done by the plaintiffs, aggregating, with the balance unpaid on the original contract, the sum of \$328.52; which amount the complaint alleges is now due and owing to plaintiffs, with interest, etc.

The answer denies the completion or performance of the contract, or that the amounts claimed by the plaintiffs are due; and in a cross-complaint specifies as breaches of the contract the failure of plaintiffs "to secret nail all stair-work . . . and to furnish selected lumber for aforesaid work and to build the stairs in accordance with said contract," etc.

The court finds the plaintiffs' allegations to be true, except that it finds that it is not true that the plaintiffs have completed the contract in accordance with its terms, or that there is now due to the plaintiffs the several amounts alleged, or any sum of money whatever; and it further finds that plaintiffs have not performed or completed the contract, and that they have "neglected, failed, and refused to secret nail all stair-work, and to properly put in the balusters of the stairs and to furnish selected lumber for said stair-work, and to complete the stairs referred to in said contract in accordance

with said contract," etc.; and that by reason of said failure the defendants have suffered damage in the sum of \$328.52, being the amount claimed to be due on the contract by the plaintiffs.

From the statement on motion for new trial it appears that the defendants were permitted to prove by several witnesses, over the objections of plaintiffs, the amount it would cost to build a new staircase in accordance with the plans and specifications—the amounts as given by the several witnesses varying from four hundred dollars to six hundred dollars. This was the only evidence of damages introduced in the case, except that of plaintiffs' witnesses, who testified that the damages resulting from the defects of construction would amount only to a few dollars. And from the testimony of these witnesses it appears, without contradiction, that all the defects complained of could be remedied at a trifling expense, except the failure to secret nail the stairs, and even this, it would appear, could be substantially remedied at a moderate cost.

On this state of the record the points are made by the appellants that the measure of damages allowed by the court was not the true one; and that there was no evidence to justify the findings of the court as to the extent of the damages. Both of these points, we think, must be sustained. The case presented is one of substantial compliance with the contract, within the rule laid down in *Perry v. Quackenbush*, 105 Cal. 307 et seq., [38 Pac. 740], and other decisions of the supreme court cited in appellants' brief; and from the findings it is apparent that it was so regarded by the court. It is also to be noted that the payment was to be made before the commencement of the work, and is, therefore, to be regarded as an independent promise within the rule stated by Mr. Anson in his work on Contracts, page 377 et seq. The measure of damages, therefore, was merely the amount of detriment suffered by the defendants by reason of the breaches of the contract, and as to this there is no evidence in the record.

Judgment and order appealed from must therefore be reversed, and it is so ordered.

Allen, J., and Gray, P. J., concurred.

[No. 28. Third Appellate District.—July 6, 1905.]

CHARLES BACON, Respondent, v. KEARNEY VINEYARD SYNDICATE, Appellant.

NEGLIGENCE—FLOODING OF VINEYARD FROM DEFECTIVE DITCH—LIABILITY FOR DAMAGES.—The owner of a ditch used for irrigation, one of the head-gates of which was in poor condition and very defective, and which was operated in such a defective manner that the water flowing therein burst from it and flooded plaintiff's vineyard to his damage, is guilty of negligence, consisting of injury occasioned to another by want of ordinary care, and is liable to plaintiff, who was without contributory fault, for all resulting damages.

ID.—PROOF OF NEGLIGENCE—DECLARATION OF FOREMAN—HARMLESS ERROR.—Where there was abundant evidence, without substantial conflict, to prove the defendant's negligence, error in the admission of the declaration of defendant's foreman on that subject, without sufficient proof of his authority, will be deemed harmless.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, for Appellant.

Frank Kauke, for Respondent.

BUCKLES, J.—This is an action for damages resulting from flooding the plaintiff's vineyard, alleged to have been caused from the negligence and carelessness of defendant and its agents in keeping and operating certain water-ditches, dams, and head-gates therein and the water running therein on to lands of defendant for irrigating, and which lands are near those of plaintiff. The answer specifically denies all the allegations of the complaint. The case was tried before the court without a jury and the judgment was for the plaintiff for the sum of \$378 damages, with interest thereon at seven per cent per annum from date until paid, and for \$62.25 costs. A motion was made for a new trial and denied. The appeal is taken from the judgment and from the order denying the motion for a new trial.

The evidence is before us in the statement settled on motion for new trial, from which evidence it appears that these are undisputed facts, viz.: 1. That defendant owned an artificial ditch used for irrigating his field of alfalfa, in which ditch are several head-gates and a dam to increase or lessen the flow of the water and to prevent the escape of the water on to other lands; 2. That plaintiff owns a vineyard of twenty acres near the said ditch; 3. That the grapes in said vineyard were near ripening; 4. That grapes in a condition of ripening would be injured by allowing the water to run over the surface of the ground around the vines; 5. That the water did escape from defendant's said ditch and did flood a part of the plaintiff's vineyard; and 6. That plaintiff's grapes were damaged by reason of the vineyard being flooded by the water escaping from defendant's ditch.

There is no claim of contributory negligence, and there is no evidence tending to show that plaintiff was in any way to blame for the flooding of his said vineyard. The defendant had the right to use said ditch and to run the water therein for the purposes of irrigating his field of alfalfa. The rule in such cases, as we understand it, is well settled, and is this: The owner of an artificial ditch through which flows water for domestic uses or for irrigation, as in this case, is bound to keep such ditch in repair so that the water running therein will not break through or escape therefrom and damage the land or crops of another, and that if through any fault or negligence of his in not properly managing the ditch, or keeping it in repair, the water does escape therefrom and injures the lands or crops of another, he is liable and the law will hold him responsible for whatever damage may be done. (*Richardson v. Kier*, 34 Cal. 75, [91 Am. Dec. 681]; *Shields v. Orr etc. Ditch Co.*, 23 Nev. 355, [47 Pac. 194]; *Loses v. Buchmann*, 51 N. H. 487.)

Defendant quotes numerous authorities to show that "one who does a lawful act upon his own premises cannot be held for injuries resulting unless the act was done in a way to indicate negligence." This is so well known and so firmly a part of our system that there is no need of repeating the cases here in which the doctrine has been announced. The evidence for both plaintiff and defendant here shows that at least one of the head-gates in said ditch was in a poor con-

dition and very defective, and operated in such a defective manner that the water flowing in said ditch burst from it and ran down on to plaintiff's vineyard. The witness Harkness, the defendant's foreman, testified: "This head-gate A was leaking, and that is why we put the dam in." This dam was put in, however, after the water had burst out of the ditch and overflowed a part of plaintiff's vineyard. The evidence clearly shows the head-gates in said ditch were defective, and that it was by reason of their defect that the water was allowed to flow in too large a volume, thus rushing out and overflowing plaintiff's land. To allow the head-gates to become leaky and so they would not hold back the water sufficiently to keep it from escaping on to plaintiff's vineyard was negligence. Negligence is defined to be, "injury occasioned to another by want of ordinary care," etc. Had the water been permitted to break out and overflow plaintiff's vineyard at a time when no injury could have resulted from the overflow, then there would have been no negligence in a legal sense, because no injury.

Error is claimed by the court permitting witness Grummett to testify as follows: "On one occasion . . . I met Mr. Tcherassy, the foreman of the Kearney Vineyard Syndicate; on Saturday evening I met him in town and had a conversation with him in regard to this flooding of Mr. Bacon's vineyard." Question. "What did he say in regard to how it was done?" The defendant objected to the question on the ground that it was incompetent, irrelevant, and immaterial, because Tcherassy was not shown to be the foreman for the defendant for this particular ditch, and whatever he might say could not bind the defendant. The objection was overruled and the witness answered: "He said he had notified the ditch man to be a little more careful, and that this happened through his carelessness." The negligence had been conclusively established by the evidence given by the testimony of the witnesses Bacon, Dow, and Lewis, the last being a witness for the defendant, and afterwards corroborated by the witness Harkness. If it was error to have admitted this evidence it could not have injured the defendant. While it might tend to prove negligence, yet there was abundant evidence, as has been seen, which was without substantial conflict on that point, to show negligence on the defendant's part,

and the error will be deemed harmless. (*Silverer v. Hansen*, 77 Cal. 579, [20 Pac. 136]; Code Civ. Proc., sec. 475.)

The judgment and order appealed from are affirmed.

Chipman, P. J., and McLaughlin, J., concurred.

[No. 80. Third Appellate District.—July 6, 1905.]

JOHN T. HARRINGTON, Appellant, v. GEORGE C. PARDEE, Governor of State, Respondent.

OFFICERS—NOMINATION—CONSENT OF SENATE—COMMISSION ESSENTIAL TO APPOINTMENT—MANDAMUS.—Where the governor had nominated an officer, and the senate had advised and consented to his appointment, the appointment nevertheless does not take effect until a commission has been issued, and where no commission was issued by the governor making the nomination, *mandamus* will not lie to compel a succeeding governor to issue the commission.

ID.—EXECUTIVE ACT—DISCRETIONARY POWER.—In issuing a commission to an officer, the governor is performing an executive and not a ministerial act, and is acting under his discretionary powers, and may or may not issue the commission, though the senate has advised and consented to the appointment.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order sustaining a demurrer to the complaint. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

White & Miller, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

BUCKLES, J.—On March 16, 1901, Henry T. Gage, who was then the governor of the state of California, nominated the plaintiff to the office of trustee of the California Home for the Care and Training of Feeble-Minded Children, and transmitted such nomination to the senate, which was then in session, and the senate duly advised in and consented to the nomination and appointment of said plaintiff. Governor Gage failed to issue to plaintiff a commission as trustee of

said home. George C. Pardee, being the successor of Henry T. Gage as governor of California, was applied to to issue to plaintiff said commission, and the governor not complying with plaintiff's request, plaintiff filed his petition in the superior court of Sacramento County praying for a writ of mandate commanding the governor to issue to him said commission. The defendant demurred to the petition on the ground that it did not state facts sufficient to entitle plaintiff to the relief sought. The demurrer was sustained. From the order sustaining the demurrer and the judgment rendered thereon this appeal is prosecuted.

The plaintiff in his brief assures us that "The question presented to the court below and argued by counsel for the respective parties was this: Has the governor a right to refuse to issue a commission after he has transmitted a nomination to the senate and the appointment has been confirmed by the latter? Or, may he thereupon ignore his own action and the action of the senate, and make a new nomination or appointment?" The trustees of said home are "appointed by the governor with the advice and consent of the senate." (Act March 9, 1887, Stats. 1887, p. 69.)

As to the trustees of this home, the governor cannot appoint when the senate is in session without the "advice and consent" of that body. In all such appointments the first step to be taken is the suggestion by the governor to the senate of the name of a person for the office and to ask the advice of the senate, and for its consent for him to appoint such person; the second step is the advice and consent of the senate which is manifested by a resolution certified to the governor and to the secretary of state, and the third and last step is the issuing of the commission signed by the governor, and this is the evidence of such appointment.

Plaintiff contends that "nominate" and "appoint" are synonymous terms and mean the same thing, and that therefore when the governor has nominated he has appointed. Doubtless there are some instances where these terms may be used to mean one and the same thing, but by no process of reasoning can it be true that in *nominating* to the senate the governor is *appointing* the person to the office, because he cannot appoint without the advice and consent of the senate. The *appointment* is not made until the *commission* is issued,

and issuing the same is the last act, and in issuing the commission of the governor is performing an executive and not a ministerial act, and is, therefore, acting under his discretionary powers, and may or may not issue the commission, although the senate may have advised it and consented that he should make the appointment. Plaintiff has presented no authority which, in our opinion, tends even in the slightest degree to show that the governor has exhausted his discretionary power when he nominates a man for office and sends the name to the senate.

Over one hundred years ago it was held by the supreme court of the United States in *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, that "The last act to be done by the president is the signature to the commission; he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed and he has decided. His judgment on the advice and consent of the senate in concurring with his nomination had been made and the officer is appointed." Defendant has presented numerous authorities sustaining and approving this rule, and the plaintiff has brought to our notice no case holding a different rule, and we have been unable to find any. This doctrine has been cited approvingly in every case in this state which involves a like question. We think a principle established so long ago, so closely adhered to, and so unanimously sanctioned by all the courts, must be too well ingrafted into our system of government to be disturbed now.

The order and judgment are affirmed.

Chipman, P. J., and McLaughlin, J., concurred.

[No. 33. Third Appellate District.—July 6, 1905.]

PACIFIC PAVING COMPANY, Respondent, v. NICHOLAS VIZELICH, Appellant, and GEORGE FINKBOHNER, Co-Defendant.

STREET ASSESSMENT—FORECLOSURE OF LIEN—STIPULATION TO ABIDE ANOTHER SUIT—JUDGMENT ACCORDING TO PRAYER OF COMPLAINT—WAIVER OF DEFECTS.—A stipulation in an action to foreclose the lien of a street assessment made after demurrer overruled that defendant need file no answer, and that the action shall abide the result of another like action by the same plaintiff against another defendant, and if that is decided for plaintiff judgment shall be rendered according to the prayer of the complaint, upon that contingency, judgment was properly rendered according to such prayer, notwithstanding the demurrer was improperly overruled, and the complaint was defective. The stipulation was a waiver of defects.

ID.—JUDGMENT BY CONSENT—REVIEW UPON APPEAL.—This court will not review a judgment rendered by consent, and a judgment under stipulation is a judgment by consent.

ID.—CONSTRUCTION OF JUDGMENT.—The judgment will be construed to correspond with the prayer of the complaint, if it is susceptible of such construction.

ID.—DISMISSAL AS TO CO-DEFENDANT—FINDING—PRESUMPTION UPON APPEAL.—Where the complaint alleged that the appellant was the sole owner of the property, and that the co-defendant claimed some interest therein, it must be presumed upon appeal in support of the judgment against the owner, and in view of the stipulation, that the action was properly dismissed as to the co-defendant, and that no finding was required as to his interest.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

J. B. Webster, and C. H. Fairall, for Appellant.

James A. Louttit, and Gunnison, Booth & Bartnett, for Respondent.

CHIPMAN, P. J.—Appeal from a judgment in an action to foreclose a street-paving lien. A general demurrer to the complaint was overruled with leave to answer. The court

found that subsequently the parties filed the following stipulation:—

“It is stipulated and agreed that the defendants in the above-entitled actions need not file an answer in said actions, but that the said actions shall abide the result of the action of the Pacific Paving Company against J. L. Mowbray, 5163, and whatever judgment may be finally entered in said actions shall also be entered in each of the above-entitled cases, whether the same be in favor of the plaintiff or defendants; and if in favor of the plaintiff, then in each case according to the prayer of the complaint.

“Dated April 23rd, 1897.

“JAS. A. LOUITT,

“Attorney for Plaintiff.

“F. H. GOULD, JAMES H. & J. E. BUDD,

“Attorneys for Defendants.”

That judgment was finally entered in favor of plaintiff in the action referred to in said stipulation, and on these findings the court entered judgment for plaintiff “for the sum of \$107.02, being the amount of principal and interest due on assessment against the lot in the complaint set forth, together with the further sum of fifteen dollars attorneys’ fees of plaintiff herein and \$14.80 costs in this action.”

Appellant makes two objections to the judgment: 1. That it is not supported either by the complaint or by the stipulation; and, 2. That the court has failed to find all the material facts.

1. The insufficiency of the alleged facts is grounded in part upon the decision in *Buckman v. Hatch*, 139 Cal. 53, [72 Pac. 445]. It is not contended that the court had not jurisdiction of the subject-matter and of the person. The defect in the complaint is not pointed out, but we may assume, as it seems not to be denied by respondent, that there was some defect in the complaint in some matter of substance. The record shows nothing but the complaint (filed December 2, 1893); demurrer (overruled January 29, 1894); stipulation (filed April 28, 1897); findings (filed September 12, 1900); judgment (entered September 12, 1900); and notice of appeal. We think the court was authorized to enter the judgment “according to the prayer of the complaint,” in accordance with the stipulation or written agreement of the parties.

This agreement was entered into more than three years after the demurrer was overruled, and manifestly to avoid a trial of this action on its merits. We think also it should be deemed to constitute a waiver of defects in the complaint of which the demurrer was intended to take advantage. The plain and natural meaning of the agreement was, that plaintiff should have judgment "according to the prayer of the complaint," regardless of defects in the complaint, on condition only that plaintiff recovered final judgment in the Mowbray case, presumably similar to this case. When the court found that such final judgment had been entered and that said stipulation had been entered into by the present parties, the conclusion of law, as the court found, followed from these facts "that plaintiff is entitled to judgment as prayed for in its complaint." (See question in some particulars discussed in *Cook v. Lion Fire Ins. Co.*, 67 Cal. 368, [7 Pac. 784].) It was held in *Erlanger v. Southern Pacific R. Co.*, 109 Cal. 395, [42 Pac. 31], that judgment by consent will not be reviewed whether or not a motion to dismiss the appeal be made; and a judgment under stipulation is a judgment by consent. (See, also, *Haskins v. Jordan*, 123 Cal. 157, [55 Pac. 786]; 2 Spelling on New Trial and Appellate Practice, sec. 676, and notes.)

But appellant suggests that if the judgment is based upon the complaint it is invalid because the amount is greater than prayed for. The prayer demanded \$51.1898, with interest thereon at ten per cent per annum from September 13, 1892, to rendition of judgment; also for fifteen dollars attorneys' fees and taxable costs. The court gave judgment as hereinabove quoted. Computation shows that by including the attorneys' fees of fifteen dollars with the interest on the principal sum we have the amount of the judgment, \$107.02, and eleven cents more. If the judgment will admit of this construction it is slightly less than prayed for. The costs are usually taxed separately because not ascertainable when the judgment is entered. We must give the judgment such construction as will support it, if this may be done within reason and accepted rules of construction. (*Davis v. Lezinsky*, 93 Cal. 126, [28 Pac. 811].) We think it reasonably clear that the sum of \$107.02 was meant to include both interest and attorneys' fees with the principal, for the judgment reads

"the sum of \$107.02, being the amount of"—and then enumerates principal and interest together with attorneys' fees. It is true the language used does not point unmistakably to this meaning, but it is equally susceptible of this meaning as of the meaning contended for by appellant. Under such circumstances we do not think the ambiguity warrants reversal. Looking to the pleadings and findings, as we may do to ascertain the meaning of the judgment, the amount at once appears to include principal, interest, and attorneys' fees allowed.

2. The complaint alleged that defendant Finkbohner has or claims some interest in the lot involved, upon which there is no finding. Appellant contends that failure to find as to Finkbohner's interest is fatal to the judgment. The action as to him was dismissed, as appears from the recitals of the judgment. What his interest in the lot was, if any, does not appear; the complaint alleged that defendant Vizelich was the sole owner, and it is the owner who is a necessary party. (*Robinson v. Merrill*, 87 Cal. 11, [25 Pac. 162].) In support of the judgment and in view of the stipulation we must presume that the action as to Finkbohner was properly dismissed, and hence no finding was necessary as to him.

The judgment is affirmed.

McLaughlin, J., and Buckles, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 31, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on September 2, 1905.

[No. 88. Third Appellate District.—July 6, 1905.]

L. H. ROGERS, Respondent, v. J. D. BYERS, Appellant.

ACTION UPON NOTE AND ABSOLUTE PROMISES—RULING UPON APPEAL—AMENDED COMPLAINT—CONDITIONAL PROMISES—NEW CAUSE OF ACTION—STATUTE OF LIMITATIONS.—Where the original complaint declared upon a note and upon absolute promises to pay the same, to take it out of the bar of the statute, and upon a former appeal it was held that evidence of conditional promises did not support

the complaint, an amended complaint setting up conditional promises *in hac verba* must be held to state a new cause of action, upon which the statute of limitations runs to the date of its filing, and if then barred, a finding to the contrary cannot be sustained.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Garoutte & Goodwin, for Appellant.

E. V. Spencer, H. D. Burroughs, and N. J. Barry, for Respondent.

McLAUGHLIN, J.—Upon a former appeal in this case the judgment and an order denying a new trial were reversed because there was a fatal variance between the allegations of the original complaint and the proofs. (*Rogers v. Byers*, 127 Cal. 531, [60 Pac. 42].) It was there held that certain letters contained conditional promises to pay and did not support the averments of the complaint. After the *remititur* was filed in the court below, the plaintiff amended her complaint by declaring upon such conditional promises, in separate counts. In other words, she stated three causes of action, each of which rested on a letter from defendant, containing a conditional promise to pay a certain note. The defendant died before the trial and the executor of his last will was substituted as defendant in this action. The executor answering denied the allegations of the amended complaint, and as a separate defense alleged that each cause of action stated therein was barred by the provisions of section 337 of the Code of Civil Procedure. The court found for plaintiff on all of the issues, and judgment having passed for plaintiff the defendant appealed. In the bill of exceptions plaintiff specifies many particulars in which the evidence is insufficient to sustain the findings. The main question argued in the briefs arises from the attack on the finding in respondent's favor on the statute of limitations. It is conceded, and under the evidence it must be held, that if the causes of action stated in the amended complaint are new and different from the cause of action stated in the first instance, then the finding in question is erroneous. We think the former decision is absolutely conclusive upon this ques-

tion. The letters upon which the causes of action stated in the amended complaint are based, were there held to be irrelevant and not germane to the cause of action originally pleaded. If there was an absolute failure of proof, and the proof consisted of these letters, it follows that any cause of action based on such proof must be foreign to the cause of action stated at the outset. If, as was there said, the former pleading was predicated upon "one promise" and the letters evidenced "another and different promise," it needs no more than the mere statement of the proposition to show that the causes of action are different. If the causes of action were the same, then certainly the evidence which would sustain one would sustain the other, and *vice versa*. The supreme court having said that the original action was based upon an *unconditional* promise to pay, and that the letters contain only *conditional* promises to pay, it follows, necessarily, from such ruling that the causes of action stated in the amended complaint are new and different from the cause of action originally pleaded. The causes of action stated in the amended complaint having accrued more than five years prior to the filing of said complaint, they were barred by the statute of limitations, and the finding to the contrary is therefore not sustained by the evidence.

The judgment is reversed.

Buckles, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on September 4, 1905; Beatty, C. J., dissenting.

[No. 4. First Appellate District.—July 7, 1905.]

ERIE CITY IRON WORKS, a Corporation, Appellant, v.
HENRY L. TATUM, and JOSEPH BOWEN, Respondents.

SALE OF ENGINE—BREACH OF WARRANTY—MEASURE OF DAMAGES.—

Where an engine was sold upon warranty of its fitness for use in running machinery, the measure of damages for a breach thereof is the excess of value which it would have had at the time to which

the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it.

ID.—CONSEQUENTIAL DAMAGES—REASONABLE CONTEMPLATION OF PARTIES.—Consequential damages are recoverable in such case only in so far as from the circumstances of the particular case they may be reasonably supposed to have been contemplated by the parties when making the contract as the probable result of a breach.

ID.—RESALE OF ENGINE UPON WARRANTY—DELAY IN PAYMENT BY PURCHASERS TO SUBVENDEES—COSTS OF SUIT—ATTORNEY'S FEES.—Where the engine was resold by the purchasers upon a like warranty, the delay of the purchasers to pay for the breach to their subvendees cannot be reasonably supposed to have been contemplated by the parties to the original sale, and the costs of suit of which the original vendor had no notice, and attorneys' fees paid therein to defend against the re warranty, are not recoverable against the original vendor upon its warranty.

ID.—COMPROMISE OF DAMAGES—INTEREST NOT RECOVERABLE ON SUM PAID.—Where the purchasers compromised the damages with their subvendees, they cannot recover any interest on the principal sum paid against their original vendor, in an action in which breach of its warranty is involved.

ID.—DEFECTS NOT WAIVED BY RETENTION OF ENGINE—REMEDIES OF PURCHASERS—RESCISSON—ACTION—COUNTERCLAIM.—Defects in the engine which constituted the breach of warranty were not waived by retention of the engine. The purchasers had the option either to return the engine and rescind the contract, or retain it and sue for damages for the breach, or may counterclaim the damages in an action for the purchase money.

ID.—CREDIT FOR REPAIRS—FUTURE DAMAGES NOT WAIVED.—A credit given for repairs by inserting a new governor in the engine, which it was supposed would remedy the defects, but which failed to do so, does not constitute a waiver of future damages, or of expense incurred in the continued use of the engine, for which the original vendor is liable. Such credit was in effect a payment which the vendor was bound to make.

ID.—DELAY IN PRESENTING CLAIM—EXCLUSIVE RIGHT OF PURCHASERS—ESTOPPEL.—The delay in presenting the claim for damages for breach of warranty, in addition to the credit for repairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. **J. C. B. Hubbard, Judge.**

The facts are stated in the opinion of the court.

Edward B. Young, for Appellant.

J. P. Langhorne, for Respondents.

HALL, J.—Plaintiff brought an action in 1895 against defendants, wherein it alleged that defendants were indebted to plaintiff in the sum of \$735 for one No. 9 Economic boiler sold to defendants by plaintiff January 25, 1895. Defendants answered, and, besides denying said indebtedness, set up a counterclaim.

In the counterclaim, after alleging the copartnership of defendants, and that plaintiff was a corporation of the state of Pennsylvania engaged in the manufacture and sale of steam-engines, defendants alleged: "3. That on or about the 31st day of August, 1888, defendants purchased of plaintiff, and plaintiff sold and delivered to defendants a so-called automatic cut-off steam-engine for the sum of eight hundred and fifty-seven dollars, which said purchase price defendants paid plaintiff, and defendants also paid \$120 freightage on said engine at time of its purchase, from Erie, Pennsylvania, to the Pacific Coast. 4. That defendants ordered said engine of plaintiff and purchased the same as a steam-engine that should be reasonably fit for the purpose of operating and running machinery, and plaintiff furnished the same to defendants as a steam-engine reasonably fit for such purpose; and plaintiff did furthermore expressly warrant that said engine would properly and effectively operate machinery. And defendants purchased said engine of plaintiff relying upon and solely by reason of said implied and express warranties that the same should be reasonably fit for operating machinery, and that it would properly and effectively operate machinery." Then follows an allegation of the breach of warranty and of damage to defendants in the sum of \$977.

The court made its findings, and among other things found that by reason of the failure of the engine to perform in a proper, efficient, and reasonable manner the work of running machinery defendants have been damaged as of date January 31, 1892, in the sum of \$883, and ordered judgment for defendants for \$364, "the same being the excess of the damages \$883, with interest thereon at seven per cent per annum from

the 31st day of January, 1892, to date hereof, over and above the sum of \$735 claimed in plaintiff's complaint, with interest thereon from the 25th day of January, 1895, to date hereof."

Plaintiff moved for a new trial, and this appeal is from the order denying its said motion.

Appellant specifies insufficiency of the evidence to justify the finding as to damages above quoted; and as we think a new trial must be granted on this ground, we will first dispose of the question thus presented.

At the trial no question was made as to the fact that defendants owed plaintiff \$735 for the boiler; and the only real contention was as to the counterclaim set up by defendants against plaintiff.

The engine was purchased by defendants of plaintiff in 1888, and by defendants sold with other things to Glenn and Handley, at Dalles City, Oregon, for the purpose of running an electric light and power plant, and on a warranty such as had been given them by plaintiff. It did not work satisfactorily, and plaintiff supplied a new governor, and in December, 1889, plaintiff gave defendants credit for a bill of expense of \$247.55 incurred on the engine, and \$27.59 freight paid by defendants on the new governor. The evidence shows without contradiction that the engine still did not efficiently or properly operate the electric light plant; and finally in 1891 defendants sued Glenn and Handley for the balance alleged to be due on their original bill of upwards of \$460 for material furnished for the electric light plant, and Glenn and Handley answered, and besides denying any indebtedness on the claim sued on, set up a counterclaim of damages in a large sum growing out of the imperfections of the said engine.

This suit was compromised in January, 1892, by an allowance or deduction of the sum of \$219 made to Glenn and Handley by the defendants in this action. We think that as to this deduction of \$219 the evidence may be fairly said to show that it was made on account of damages and expenses to which Glenn and Handley had been put subsequent to the first allowance heretofore referred to by reason of the imperfections of the engine. Shortly after this compromise defendants sent a bill to plaintiff for \$319, being the \$219

plus \$100 paid their attorney in the matter of said suit. This bill plaintiff refused to allow or pay, and the matter was allowed to rest until the present suit.

On the trial of this case the only evidence as to the amount of damage suffered by defendants by reason of the breach of warranty as to the engine was given by Mr. Tatum, a member of the defendant firm. He said: "The damages that my firm sustained on account of defects in the engine subsequent to December 9, 1889" (the date of the first bill of expense which had been paid) "was \$319, for which we sent in a claim; that was composed of \$100 for attorneys' fee to Woodward & Woodward in the suit that we brought against Glenn and Handley, which was compromised; and then there was \$20 court costs; there was \$100 attorneys' fees and \$219 allowed on our bill; that claim of \$319 did not include the freight of \$120 paid by us on the automatic cut-off engine, nor the \$20 court costs, nor interest on our claim against Glenn and Handley in the sum of \$544." The sum of \$219, plus \$100 attorneys' fees plus \$20 court costs, plus \$544 interest, amounts to \$883, which, it will be observed, is the amount of damages found by the court as of date January 31, 1892.

There was also read in evidence a communication under date January 28, 1892, from the attorneys of Tatum and Bowen (defendants herein) in the suit against Glenn and Handley, purporting to show the loss of Tatum and Bowen on the compromise, in which they say:—

"The expenses of suit and first costs of court....	\$ 20.00
"Attorneys' fees	100.00
"Discount allowed defendant on settlement.....	219.00

"Making total\$339.00

"To this sum should be added interest on principal sum for 2 years 10 months at legal rate of interest 8 per cent per annum, amounting to.....544.00

"Making total loss\$883.00"

This statement of the attorneys for defendants made to defendants is not evidence against the plaintiff, and only serves to make clear the basis upon which the court fixed the amount of damages.

The sum of \$120 paid by defendants as freight on the engine cannot be considered in fixing the damage, for it is shown that defendants sold the engine to Glenn and Handley as part of an electric plant before any defect was discovered in the engine, and undoubtedly charged for the engine such price as they thought reasonable, and upon final settlement of their bill against Glenn and Handley the only deduction claimed to have been made from their bill on account of this engine was the sum of \$219. Nevertheless the court fixed their damages at the sum of \$883, evidently adding to the \$219, deducted from their bill, the \$100 attorneys' fees, \$20 court costs, and \$544 interest on defendants' total claim against Glenn and Handley. The bill of defendants against Glenn and Handley included many things besides this engine, and amounted originally to upwards of \$4,600, and at the time of the bringing of the suit to over \$2,500.

The Civil Code, section 3313, provides that "The detriment caused by the breach of a warranty of the equality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

Section 3314 provides that "The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose."

No evidence was given as to the actual value of the engine, but all the evidence of damages was directed to consequential damages or loss incurred by an effort to use it.

Speaking of consequential damages in cases of breach of warranty, the court said in *Wilson v. Reedy*, 32 Minn. 256, [20 N. W. 153]: "The rule as to this class of damages, as laid down in *Hadley v. Baxendals*, 9 Exch. 341, and approved in *Paine v. Sherwood*, 21 Minn. 225, and in *Frohreich v. Gammon*, 28 Minn. 476, 481, [11 N. W. 88], is that such damages are recoverable when, from the circumstances of any particular case, they may reasonably have been supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach."

The evidence in this case does not show that the delay in paying defendants' bill against Glenn and Handley was caused solely by controversy over the engine, but if it did we do not think that such loss can be reasonably supposed to have been contemplated by plaintiff and defendants when the engine was sold by plaintiff to defendants.

We have been cited to no case where attorney fees have been allowed to swell damages in cases of breach of warranty on sale of personal property; but on the contrary, in the case of *Reggio v. Braggiotti*, 7 Cush. 166, cited by respondent, it was held that in no case can the attorney fee paid by the first vendee in defending himself in suit brought by his subvendee be allowed to swell damages against the original vendor. The *syllabus* in this last-mentioned case so completely fits the case at bar that we quote it in full: "The measure of damages, in an action brought for a breach of an implied warranty of the genuineness of an article sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold; and if the vendor [vendee] has in the mean time sold the article with a like warranty, the sum paid on a judgment obtained against him, in an action brought by his vendee for a breach of that warranty, is *prima facie* evidence of the amount which he can recover of his vendor; and if he gave notice to his vendor of the commencement of that action, he may also recover his taxable costs therein; but he can in no case recover counsel fees paid for the defense thereof." (The italics are ours.)

The same rule is laid down as to taxable costs in a similar case in *Coolidge v. Brigham*, 5 Met. 68.

In this case it is not shown that defendants gave plaintiff notice either of the suit they brought against Glenn and Handley, or of the counterclaim set up by Glenn and Handley. Neither the interest on the principal of defendants' claim nor the costs or attorneys' fees should have been included in the damages found; and the finding that defendants were damaged in the sum of \$883 is therefore not supported by the evidence.

It is urged by appellants that the engine having been retained after examination and trial, all defects were waived, and no action would lie in favor of defendants on account of the breach of warranty. This is not the law. On the con-

trary, one buying with a warranty, on discovering the breach of warranty, may either return the goods and rescind the contract, or he may retain the goods and bring an action for the breach of warranty, or plead the breach as an offset in any action brought by the vendors for the purchase money. (*Polhemus v. Heiman*, 45 Cal. 573.) Indeed, the various authorities cited by appellant concede this to be the rule.

It is also urged by plaintiff that all damages arising from the breach of warranty were paid by appellant by the credit given defendants shortly after supplying the new governor. We do not think that this contention can be sustained. It is probably true that it was believed at the time the said credit was given that the new governor had remedied all defects in the working of the engine, but this proved not to be true. Appellant in giving the credit made a payment which it was legally bound to make, and there is nothing in the record to sustain the proposition that there was any agreement, express or implied, that by so doing it relieved itself from liability for any future damage that might result from an effort to use the engine. On the contrary, it is quite evident that it was intended that Glenn and Handley should, after receiving the new governor, continue the use of the engine. They did so, and were put to much expense in so doing, for which defendants were liable to them, and appellant as the original warrantor to defendants.

Practically the same matter, coupled with delay in presenting claim for damages, is urged by appellant as an estoppel; but having in mind the relation of the parties (defendants had the exclusive right to handle on this coast articles manufactured by appellant, and were charged with the duty to advance its sales and trade on the coast) we see nothing in the case to work an estoppel. Other matters urged by appellant are disposed of by what we have said on the question of damages.

Order denying motion for new trial is reversed.

Cooper, J., and Harrison, P. J., concurred.

[No. 119. Third Appellate District.—July 7, 1905.]

EX PARTE HARRISON BOYNTON.

HABEAS CORPUS—INSUFFICIENT COMPLAINT FOR DISTURBING PEACE.—A complaint for disturbing the peace and quiet of complainant on certain streets in a town by then and there using vulgar and profane language in the presence and hearing of said complainant and in the presence and hearing of women and children on the said streets is insufficient to state a public offense in that it does not charge that it was done “in a loud and boisterous manner,” nor state anything to connect the language used with “offensive conduct.” A defendant held under such complaint is entitled to be discharged upon *habeas corpus*.

HABEAS CORPUS to test the validity of a justice’s sentence for misdemeanor in the town of Suisun City, Solano County.

The facts are stated in the opinion of the court.

A. Campbell, for Petitioner.

T. T. C. Gregory, District Attorney of Solano County, for Respondent.

BUCKLES, J.—The petitioner comes before this court on a writ of *habeas corpus*. He was arrested in the town of Suisun City on a warrant for disturbing the peace. He was brought before the justice of the peace and pleaded guilty, and on the ninth day of June, 1905, was sentenced to sixty days’ imprisonment in the county jail of Solano County. Petitioner claims the complaint on which he pleaded guilty charges no public offense. The charging part of said complaint is as follows:—

“Did willfully and unlawfully and maliciously disturb the peace and quiet of said Chas. H. Downing, on Solano and Main streets in the said town of Suisun City, by then and there using vulgar and profane language in the presence and hearing of said Chas. H. Downing, and in the presence and hearing of women and children on the said streets of the said town of Suisun City.”

It was evidently intended, and the district attorney admits as much on the argument, to charge the petitioner with dis-

turbing the peace by using "vulgar and profane language in the presence or in the hearing of women and children in a loud and boisterous manner," as provided in the latter part of section 415 of the Penal Code. If such was the intention, then the complaint fails to charge a public offense, because it leaves out what seems to us to be the very necessary matter to complete the offense, to wit, "in a loud and boisterous manner." The district attorney claims, however, that the complaint states the crime of disturbing the peace by offensive conduct, which consists in using vulgar and profane language in the presence and hearing of Downing and in the presence and hearing of women and children. But we think this view cannot be maintained, because there is no allegation in the complaint that the peace of Downing was disturbed because of offensive conduct. It may be true, and most likely is, that the vulgar and profane language used by petitioner was offensive to Downing, but he does not so charge in his complaint, and there is nothing in the complaint to connect the language used with "offensive conduct." The cases cited by the district attorney from the states of Missouri, Texas, Michigan, Arkansas, and South Carolina, whatever application they may have under the statutes in those states, do not support the contention of the district attorney when attempted to be applied to the provisions of section 415 of the Penal Code of this state. The complaint charges no public offense, and the petitioner is entitled to his discharge.

Petitioner will be discharged.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 34. Third Appellate District.—July 11, 1905.]

HOWARD PERRIN, Appellant, v. CHARLES L. CARBONE, Respondent.

ACTION FOR MONEY LOANED—MODE OF REPAYMENT—CONFLICTING EVIDENCE.—In an action for money claimed to have been loaned to the defendant without conditions, where defendant claimed that it was advanced by plaintiff as agent of an insurance company to defray

expenses of defendant as a soliciting agent of the same, and was not to be repaid except out of commissions earned, when sufficient, where the evidence was sharply conflicting, the verdict of the jury for the defendant cannot be disturbed in the absence of reversible error.

1a.—CROSS-EXAMINATION OF PLAINTIFF—QUESTION NOT ANSWERED.—

The alleged error of the court in overruling an objection to a question asked of the plaintiff on cross-examination does not appear prejudicial where the record shows no answer to the question.

1b.—PROPER CROSS-EXAMINATION—CUSTOMARY ACTION OF PLAINTIFF.—

It was proper to ask of plaintiff upon cross-examination how many agents he had employed during the last five years that had received loans from him whose commissions had not covered the amount of loans and whom he had not sued, and to show in answer thereto that there were at least a dozen of them, as tending to discredit plaintiff's theory that the advance to defendant was to be paid irrespective of commissions.

APPEAL from a judgment of the Superior Court of Napa County and from an order denying a new trial. H. C. Gesford, Judge.

The facts are stated in the opinion of the court.

Weber & Rutherford, for Appellant.

Bell, York & Bell, for Respondent.

BUCKLES, J. This is an action to recover the sum of three hundred and twenty dollars, money loaned. The answer denies the loan as plaintiff pleads it, and sets up the defense that the money was advanced to defendant by plaintiff as the agent of the Washington Life Insurance Company of New York for the purpose of defraying the expenses of defendant, who was acting as soliciting agent for said insurance company, and that such moneys were not to be repaid except out of the commissions he, the defendant, should earn, when the same should be sufficient. The case was tried by a jury. There were but two witnesses, the plaintiff and the defendant, and the verdict was for the defendant, and judgment was rendered accordingly for defendant, for his costs, amounting to \$39.65. A motion was made for a new trial, and denied. The appeal is from the judgment and from the order denying the motion for a new trial.

The evidence shows no difference between the parties as to the amount of money advanced or the date when loaned, but there is a marked and substantial difference as to the repayment of the three hundred and twenty dollars, plaintiff saying it was to be repaid without any condition, and the defendant that it was to be repaid only in case he should make it in the way of commissions in selling insurance for the company. With this very substantial conflict in the evidence the judgment could not be disturbed unless there was some reversible error committed at the trial. Several errors are complained of in the bill of exceptions, but only two seem to have been taken as at all serious, for appellant has mentioned but these two in his argument. The first alleged error our attention is called to is the ruling of the lower court in overruling appellant's objection to the question asked Perrin on cross-examination, which is as follows: "Why did you make an exception in Charlie Carbone's case?" The court overruled the objection, and the record fails to show that the witness answered it at all, unless the answer can be found in the answer to some other question to which there was no objection interposed. The question not having been answered, there was no prejudicial error. (*People v. Dennis*, 39 Cal. 625-635.)

The next point to which our attention is called is the alleged error of the trial court in overruling plaintiff's objection to the following question asked by defendant of the witness Perrin on cross-examination: "How many agents have you employed during the last five years that have received loans from you whose commissions have not covered the amount of loans, and whom you have not sued and brought an action against?" Objection was made on the ground that it was irrelevant, immaterial, and incompetent, and not cross-examination, and had nothing to do with the case at issue. The objection was overruled, and the witness answered, "At least a dozen." We think there was a relevancy. The plaintiff claims there was no condition attached to the loan. If the plaintiff had advanced money to twelve other agents whose commissions had not amounted to enough to repay the loans, and no effort was made to collect the money so advanced, this fact would tend, in some small way at least, to discredit plaintiff's theory that he loaned the money to defendant to be repaid irrespective of commissions earned. And, then, it is

cross-examination, because plaintiff bases his right to recover upon the theory that the money advanced was a loan without any conditions as to payment, and while he does not specifically so state on his direct examination, yet every intendment of his testimony is to that effect; and everything which will tend to rebut the fact testified to by a party to an action, or dispute an inference that may be drawn from his direct testimony, is admissible on cross-examination. It must be borne in mind that Perrin was the plaintiff and claiming to recover on a contract, on a theory disputed by the defendant. And surely the plaintiff in a case like this would come under the general rule, that a witness may be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility. There was no error in this ruling.

Judgment and order appealed from are affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 32. First Appellate District.—July 13, 1905.]

R. S. CHATHAM, Respondent, v. J. H. MANSFIELD, Appellant.

ELECTION CONTEST—STATEMENT BY ELECTOR—DATE BEFORE FILING—

OBJECTION UPON APPEAL.—Upon the contest of an election by an elector, where the statement, signed and dated the day before it was filed, shows that at the time of the election and canvass of the returns and at the date of the statement he was an elector, an objection not raised in the lower court cannot for the first time be urged upon appeal that the statement does not show that the contestant was an elector when the statement was filed.

Id.—CONSTRUCTION OF CODE—FORMER AND IMMATERIAL DEFECTS.—The

literal rule stated in section 1117 of the Code of Civil Procedure, that a statement shall not be dismissed for want of form, should be held to apply not only to the statement of the grounds of contest therein referred to, but also to any other matter alleged in the statement. The same rule is to be applied to the statements and pleadings in election contests as would be applied to pleadings in other cases, and immaterial defects should be disregarded.

Id.—CONSTRUCTIVE SERVICE OF CITATION AT RESIDENCE OF DEFENDANT—DUE PROCESS OF LAW—PRESUMPTION.—The provision in section

1119 for a constructive service of the citation, in case the defendant cannot be found, by leaving a copy thereof at the house where he last resided, is not unconstitutional. Such constructive service constitutes due process of law, and the defendant must be presumed to know the law, and that after the return day of the election, if he absented himself, a citation might be left at his residence.

Id.—INSECURE BALLOTS—ACCESS OF PUBLIC—ABSENCE OF EXPLANATORY PROOF—RETURNS NOT CONTROLLED.—Where the envelopes inclosing the ballots of certain precincts were received by the clerk in a broken condition, so that they might be interfered with, and were so kept by the clerk for a time that others might have access to them, and were afterwards sealed up by him, such ballots, in the absence of explanatory evidence to establish their genuineness with reasonable certainty, are *prima facie* impeached, and cannot be received to control the official returns.

APPEAL from a judgment of the Superior Court of San Mateo County. Frank J. Murasky, Judge presiding.

The facts are stated in the opinion of the court.

C. W. Eastin, Edward F. Fitzgerald, and G. W. McKerney, for Appellant.

George C. Ross, for Respondent.

COOPER, J.—The parties to this suit were rival candidates for the office of sheriff of San Mateo County at the election held in November, 1902. The returns from all the election precincts in the county being made, the board of supervisors canvassed them, and thereupon made an order that plaintiff had received 1,378 votes, and that defendant had received 1,441 votes, and that defendant was the duly elected sheriff.

Plaintiff filed a written statement for the contest of said election, which came on for hearing at a special session of the court commencing in December, 1902. The case was finally submitted in March, 1903, and in April following the court filed its findings, to the effect that plaintiff had received 1,219 legal votes, and the defendant had received 1,218 legal votes, and judgment was accordingly entered declaring plaintiff the duly elected sheriff of the county. From this judgment the defendant has appealed on the judgment-roll and a bill of exceptions.

The contest was brought and the proceedings had under title 2 (secs. 1111-1127, inclusive) of the Code of Civil Procedure. It is declared in section 1111 that "Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein" for certain causes enumerated in the section. Defendant contends that the statement filed is fatally defective in not alleging that at the time of filing it the plaintiff "is an elector." The statement is dated November 18, 1902, gives the date of the election, and the date when the board of supervisors met to canvass the returns, and it alleges that plaintiff was an elector "at all the times herein mentioned." It shows that at the time it was dated the plaintiff was an elector. If it had stated that "he is an elector," it would have referred to the time when the statement was made and signed. It was not filed until the following day, November 19th; but we do not think the ends of justice require us to presume that plaintiff was an elector on the eighteenth and not on the nineteenth day of November. Particularly is this so, as section 1117 of the Code of Civil Procedure provides: "No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested." The above section refers to the grounds of contest; but we think the liberal rule therein stated should be held to apply to any other matter alleged in the statement. The defect (if the statement may be considered defective) did not affect the substantial rights of the parties. (Code Civ. Proc., sec. 475.)

This is in accord with the views of the court in *Doty v. Jenkins*, 142 Cal. 498, [77 Pac. 1104]. There the lower court allowed the plaintiff to amend his statement by showing that he was an elector of "the fifth supervisorial district." It is true that in that case the forty days had not elapsed at the time the amendment was made, but the principle is stated. The court said: "An amendment to a statement of contest is to be construed by the same rule as an amendment to a complaint. Unless from the nature of the facts alleged, or otherwise, the contrary appears, it is to be deemed a statement of the facts existing at the commencement of the action

or proceeding. The amendment in question must be thus construed. It takes effect as if it had been originally incorporated in the statement."

The same rule is applied to the statement and pleadings in an election contest as would be applied to pleadings in other cases. (McCreary on Elections, secs. 431, 440.) In the latter section cited it is said: "It may be stated as a general rule in this country that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. Immaterial defects in pleadings should be disregarded; necessary and proper amendments should be allowed as promptly as possible."

Here there was no special demurrer pointed to the defect now so strenuously urged. It does not appear to have been in any way called to the attention of the trial court. No objection to the jurisdiction of the court or to the evidence was made on the ground that the statement did not show plaintiff to be an elector. In *McDougald v. Hulet*, 132 Cal. 160, [64 Pac. 278], the court said: "Plaintiff, by bringing the defendant Boggs into court, and asking the court to find the amount due, and by allowing the court to pass upon the issue as though properly made, is estopped from now claiming that the matter was not the subject of a counterclaim. He will not be allowed to thus lull his adversary into repose until his claim is barred by the statute, and then raise a point which is lethal."

In the case at bar, if plaintiff was an elector of the county at the time he filed his statement, he had the right to contest defendant's election. He was before the court upon a complaint, which he evidently deemed sufficient. Defendant treated it as sufficient. It is now too late to ask this court to hold it to be mere waste paper.

Defendant was served with the citation by leaving a copy at his residence, the officer being unable to find him. Section 1119 of the Code of Civil Procedure provides that if the person whose right to the office is contested cannot be found, he may be served "by leaving a copy thereof at the house where he last resided, at least five days before the time so specified." It is claimed that such provision for constructive service is

unconstitutional, and that defendant could not be brought into court except by personal service. If this were held to be the law, the defendant, by absenting himself where he could not be personally reached, might prevent a contest under the provisions of the code. An election contest is intended to be a summary proceeding, and is one in which the people of the political subdivision in which the contest is pending are interested. The defendant is presumed to have known the law, and to have known that after the return day of the election, if he absented himself, a citation might be left at his residence. It was so left, and he must have received it. The legislature have the right to provide for constructive service in such case. Due notice to the defendant is essential to the jurisdiction of all courts, but such notice may be either actual or constructive in certain cases as prescribed by the law pertaining to the forum in which such notice is given. If the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is given him to defend, and the notice is given as the law requires, this will be held sufficient and due process of law. (*Rockwell v. Nearing*, 35 N. Y. 314; *Kenward v. Louisiana*, 92 U. S. 482; *Earle v. McVeigh*, 91 U. S. 507; *Sturgis v. Fay*, 16 Ind. 429, [79 Am. Dec. 440]; *McCreary on Elections*, sec. 426.)

A more serious question, and one which necessitates a reversal of the judgment, was the receiving in evidence of the ballots from Baden, Colma, and Menlo Park precincts under defendant's objection.

The judges of election in the various precincts are required by law, as soon as the polls are closed, to canvass the votes given at such election in such precinct. The canvass must be public, in the presence of the bystanders, and continued without adjournment until completed and the result declared. The judges are sworn officers, and the result declared by them is *prima facie* correct.

In an election contest the ballots are the best evidence, and may be used to overcome and set aside the result as declared by the official canvass when their integrity can be satisfactorily established. It is intended by the statute that the ballots shall be preserved inviolate and above suspicion, so that

they may be used in a contest. Each ballot, as soon as the names marked on it as voted are read and verified, must be strung on a string by one of the judges, and must not thereafter be examined by any person, but must, as soon as all ballots are counted, be carefully sealed in a strong envelope, each member of the board writing his name across the seal. (Pol. Code, sec. 1259.) A member of the board must, without its having been opened, deliver such envelope to the county clerk, nearest postmaster, or sworn express agent, for delivery to the county clerk, who shall indorse on such envelope the name of the party delivering it and date of such delivery. On receipt of the envelope the clerk must file it, and keep it unopened and unaltered for twelve months, unless in case of a contest. (Pol. Code, secs. 1264, 1265.) It was testified at the trial by the deputy county clerk that the "Colma package was delivered broken open to me. . . . It was delivered by Wells, Fargo & Company." The county clerk testified that the packages from Colma, Baden, and Menlo Park precincts were all "broken open" when received; that the ends of the ballots and the tally sheets were there; "anybody could pull them out if they wanted to look at them; that is the way they came by Wells-Fargo."

Fox, a deputy clerk, testified that the packages or envelopes containing the ballots were filed, and then placed in the lower vault in the clerk's office, and kept there for several days; that the vault was open all the time. The witness was then asked:—

"Q. Now, Mr. Fox, during that time that those pouches were in the lower vault, are you prepared to say that they were not interfered with by any person during the whole time that they were there until they were put in the upper vault?—A. I would not say positively that they were not interfered with; they were deposited in the vault, and we were going back and forth all of us at different times.

"Q. Well, this vault is open for all other persons?—A. Yes, sir, other people have access to the vault besides the clerk and his deputies."

This witness further testified that it was thought there might be some question as to these packages, and they resealed them and put them all in the upper vault, where they were locked and secured.

The lower vault, where the ballots were kept for several days, was used in connection with the county recorder's office; was not kept locked all the time, and was open to the public. After the envelopes containing the ballots had thus lain on the floor of the lower vault several days, they were placed in the upper vault, where not the clerk, but one of his deputies and a deputy recorder, had the combination. They were not then kept in the exclusive charge of the clerk or his deputy. While the packages lay in the lower vault many people, including political opponents of defendant, were in and about the office, and knew the condition of the envelopes. On the recount there was one less ballot in Baden precinct than the official canvass showed; in Colma precinct the official canvass showed four more ballots than were produced in court; and in Menlo Park precinct there was one more ballot produced in court than the official canvass showed. In the count in court, defendant suffered a net loss of thirty-six votes from that shown by the official count in these three precincts. The difference of six ballots between the official count and the ballots counted in court during the trial is certainly a strong circumstance tending to impeach the integrity of the ballots.

No election officer was called to prove either the identity of the ballots, or that the envelopes were ever sealed. It was not proven that the envelopes were sealed when delivered to Wells, Fargo & Company, nor who delivered them, or either of them. It was not attempted to be proven that Wells, Fargo & Company delivered them in the same condition in which they received them. It is said in *McCreary on Elections* (secs. 471, 473): "Such ballots, in order to be received in evidence, must have remained in the custody of the proper officers of the law from the time of the original official count until they are produced before the proper court or officer; and if it appear that they have been handled by unauthorized persons, or that they have been left in an exposed or improper place, they cannot be offered to overcome the official count, . . . but the better opinion seems to be that if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the court should exclude them; but if the deviations have been slight, or of such a character as not necessarily to render doubtful

the identity of the ballots, the question of their identity may well go to the jury to be determined upon all the evidence."

It is said by Judge Cooley in his work on Constitutional Limitations (7th ed., p. 941): "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all."

Our own court in the case of *Tebbe v. Smith*, 108 Cal. 107, [49 Am. St. Rep. 68, 41 Pac. 454], said: "One who relies, therefore, upon overcoming the *prima facie* correctness of the official canvass by a resort to the ballots must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode."

In *Russell v. McDonald*, 83 Cal. 78, [23 Pac. 183], it was said by the chief justice, in speaking of a failure of the election board to comply with certain sections of the Political Code: "Officers of election are, like all other persons, presumed to know the law, and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient, *prima facie*, to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very willing to believe that the officers of those precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But as the case is presented we cannot indulge in that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with a fraudulent purpose; and in the absence of any rebutting proof on this point we feel constrained to hold that contestant made out a case of malconduct on the part of the election boards."

We may well apply the reasoning of that case to the question here. Why was it not proven that these envelopes were sealed and not opened by any one until placed in charge of Wells, Fargo & Company? Some one must have taken charge of the envelopes in the precincts, and delivered them to Wells, Fargo & Company. It seems that it would have been easy to

prove such fact. It was not incumbent on defendant to prove that votes had been taken out of those envelopes and changed. Where such circumstances appear that it is apparent that opportunities existed for evil-minded persons to have examined the ballots and changed them, their integrity is impeached. It is at once apparent that the official canvass is much more liable to be correct than a recount of ballots that have been in so many suspicious places.

In the leading case of *People v. Livingston*, 79 N. Y. 279, the chief justice said: "They [the returns] may be impeached for fraud or mistake, but in attempting to remedy one evil, we should be cautious not to open the door to another and far greater evil. After the election it is known just how many votes are required to change the result; the ballots themselves cannot be identified—they have no earmark. Everything depends upon keeping the ballot-boxes secure. . . . Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. *It is not sufficient that a mere possibility of security is proved*, but the fact must be shown with reasonable certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but if not, they are not only the weakest but the most dangerous evidence. . . . Where ballots in an envelope sealed with the village seal are put by the village clerk in an unlocked desk, containing also the village seal, and situated in a room exposed to the public, and the envelope is partly torn by some unknown person while it remained in such desk, the ballots are not better evidence of the result of the election than the returns of the judges." (See, further, *People v. Burden*, 45 Cal. 241; *Coglan v. Beard*, 65 Cal. 61, [2 Pac. 737]; *Ex parte Brown*, 97 Cal. 89, [31 Pac. 840]; *Whipley v. McCune*, 12 Cal. 352; *Rhode v. Steinmetz*, 25 Colo. 314, [55 Pac. 814]; *Hartman v. Young*, 17 Or. 157, [11 Am. St. Rep. 787, and note, 20 Pac. 17]; *Hughes v. Holman*, 23 Or. 489, [32 Pac. 298]; *Beall v. Albert*, 159 Ill. 127, [42 N. E. 166]; *Ex parte Arnold*, 128 Mo. 260, [49 Am. St. Rep. 557, 30 S. W. 768, 1036].)

Plaintiff relies upon an expression of Mr. Justice McFar-

land in *Hannah v. Green*, 143 Cal. 22, [76 Pac. 708], where it is said: "The question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition is a question which is largely within the judgment and discretion of the trial court, and its determination of that question should not be disturbed here if the evidence fairly warrants the conclusion which the court reached on that subject."

The learned justice was speaking with reference to the facts of that case, which were entirely different from the case at bar. In this case, if the evidence were such as to fairly warrant the conclusion reached by the trial judge, we would not interfere. While the decision of the trial court should not be disturbed if there is sufficient evidence to fairly support it, yet we cannot give it more weight than the law, in its application to the facts, would allow. The discretion of the trial court gives it power to decide upon conflicting evidence, and to consider all the facts and the credibility of witnesses; but upon a contest depending upon the integrity of ballots the question is as to whether or not they have been so guarded as to be the best evidence and entitled to be recounted. In this case we do not think there is sufficient evidence to sustain the finding of the court on the question.

The judgment is reversed.

Hall, J., and Harrison, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 12, 1905.

[No. 14. Second Appellate District.—July 13, 1905.]

WILLIAM M. PECKHAM et al., Respondents, v. E. R. FOX,
Appellant.

MECHANICS' LIENS—ATTORNEY'S FEES ON FORECLOSURE—CONSTITUTIONAL LAW.—Section 1195 of the Code of Civil Procedure, providing for the allowance of attorney's fees on the foreclosure of mechanics' liens, is valid, and not in conflict with any provision of the state or federal constitution; and the attorney's fees allowed thereunder are a lien upon the property foreclosed.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Cole & Cole, for Appellant.

Hugh J. Crawford, and Borden & Carhart, as *Amici Curiae*, for Respondent.

SMITH, J.—This is an appeal from a judgment foreclosing a mechanic's lien. The only objection urged by appellant's counsel is to the attorney's fee allowed by the court and made a lien upon the property in question. The points made by the appellant are: First, that section 1195 of the Code of Civil Procedure, providing for such fees, is unconstitutional; second, that there is no provision in the act making the attorney's fees a lien upon the property foreclosed. But neither point is tenable.

As to the first, under familiar rules of construction, there is nothing in the provisions of section 15 of article XX of the constitution to limit the ordinary powers of the legislature; or to take from it the specific power exercised in section 1195; nor is the constitutional provision to be construed as repealing the existing provisions of the Code of Civil Procedure on the subject of "liens of mechanics and others"; among which is the section in question. (Sedgwick on Statutory and Constitutional Law, pp. 123 et seq.; *Germania etc. Assn. v. Wagner*, 61 Cal. 349.) On the contrary, the duty is imposed upon the legislature to "provide by law for the speedy and efficient enforcement of such liens"; and this, we think, imposes upon it, if deemed necessary to that end, the duty of providing for the cost of recording the lien and attorney's fee "as an incident to the judgment" (*Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, [16 Pac. 325]; *McIntyre v. Trautner*, 78 Cal. 449, [21 Pac. 15]; *Schallert etc. Lumber Co. v. Neal*, 94 Cal. 192, [29 Pac. 622]); or, at least, empowers it to do so. (*San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, [46 Pac. 735, 1057]; *Sweeney v. Meyer*, 124 Cal. 517, [57 Pac. 479].) Nor are the provisions of section 1195 in conflict with section 1 of the fourteenth amendment to the federal constitution, or with any other provision of the federal or state constitution.

The second point is in effect disposed of by the decision in *Reid v. Clay*, 134 Cal. 215, 216, [66 Pac. 262.] That was a case of the foreclosure of a street assessment lien, under the act governing that subject, which provided that "in all cases of recovery under the provisions of this act the plaintiff shall recover the sum of fifteen dollars, in addition to the taxable cost, as attorney's fees." (Stats. 1889, p. 168, sec. 12.) And it was held that "this must be construed as entitling him to the recovery of it as part of the recovery and judgment provided for, which is exclusively for a lien"; and it was added upon the authority of cases cited that, "otherwise, it could not be recovered." The cases are substantially similar in principle. In this respect cases coming under the provisions of section 1195 of the Code of Civil Procedure, and similar statutes, are to be distinguished from the case of foreclosure of mortgages, where there is no statutory provision providing for attorney's fees, "in the absence of a provision in the mortgage." (*Monroe v. Fohl*, 72 Cal. 570, [14 Pac. 514]; *Hotaling v. Montieth*, 128 Cal. 556, [61 Pac. 95].)

The judgment appealed from is affirmed.

Gray, P. J., and Allen, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court September 11, 1905.

[No. 27. Second Appellate District.—July 13, 1905.]

DORA ANDROS, Respondent, v. L. M. ANDROS, Appellant.

DIVORCE—ADULTERY NOT CONDONED—SUPPORT OF FINDINGS.—Where a divorce was granted to the wife on the ground of adultery of the husband, and the defense was condonation, on the ground that the physical condition of the defendant, long known to the wife before ceasing to cohabit with him, was such as would ordinarily be taken as proof of unfaithfulness, but the court found upon sufficient evidence that plaintiff at first believed his representation that his condition was not so occasioned, and that after becoming convinced of the contrary she never thereafter cohabited with him—the condonation was not sufficiently established to bar the plaintiff's right of action.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

H. W. Nisbet, for Appellant.

B. E. Bledsoe, and C. L. Allison, for Respondent.

ALLEN, J.—Action for divorce. Judgment in favor of plaintiff. Defendant appeals from the judgment and order denying a new trial.

It is insisted upon this appeal that the judgment was rendered in violation of section 130 of the Civil Code, which provides that no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties; and that if any matrimonial offense had been established the same had been completely and fully condoned. The court found in favor of the plaintiff upon all of the material issues, and while the corroborating testimony tending to establish the marital offense was slight, there was, nevertheless, some testimony to justify the court in its finding in that regard.

As to the question of condonation, which by section 115 of our Civil Code is declared to be the conditional forgiveness of a matrimonial offense constituting a cause of divorce, and by section 116 such condonation requires a knowledge on the part of the condoner of the facts constituting the cause of divorce, the record discloses that the defendant's physical condition, known to plaintiff long before she ceased to cohabit with him as his wife, was such as would ordinarily be taken as proof of unfaithfulness; yet it appears from the testimony—and the court accepted it as the truth—that the plaintiff believed the representations of her husband that his condition was not so occasioned. This no doubt upon the theory that the confidence of a wife in her husband's loyalty leads her often to accept as true that which would not be accepted if proceeding from a stranger. There was some testimony to warrant the court in finding that after becoming convinced of the cause of his physical condition she never thereafter cohabited with him as his wife; and there was sufficient testimony to warrant

the court in finding that his physical condition was the result of an adulterous act.

We think the condonation was not established sufficiently to bar the plaintiff's right of action, and we perceive no error in the record.

Judgment and order affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 23. Second Appellate District.—July 13, 1905.]

BOARD OF EDUCATION OF THE CITY OF SAN
DIEGO, Appellant, v. COMMON COUNCIL OF THE
CITY OF SAN DIEGO, Respondent

WRIT OF MANDATE—NON-ENFORCEABILITY—TAX UNDER CHARTER—DIS-
MISSAL OF APPEAL.—A writ of mandate which cannot be enforced
will not issue; and an appeal from a judgment sustaining a de-
murrer to a petition for a writ of mandate to enforce the levy of
a school tax which could not be enforced under the city charter
when the appeal was taken, will not be reviewed upon its merits,
but will be dismissed.

APPEAL from a judgment of the Superior Court of San
Diego County. N. H. Conklin, Judge.

The facts are stated in the opinion of the court.

Cassius Carter, District Attorney, W. R. Andrews, Deputy,
Collier & Smith, and Withington & Carter, for Appellants.

H. E. Doolittle, City Attorney of San Diego, for Re-
spondent.

ALLEN, J.—This is an appeal from an order of the supe-
rior court of San Diego County sustaining a demurrer to a
petition for a writ of mandate directing the city council of
San Diego to levy a tax for school purposes upon the taxable
property of said city, under the provisions of the charter
thereof.

The record discloses, and it is conceded by counsel, that the
demand and requirement upon the part of plaintiff board for
such levy and the refusal of the council in connection there-

with was had with reference to a levy which, by such charter, was required to have been made on or before the second Monday of May, 1903.

It is apparent, therefore, that no authority now reposes in the council to make such levy, nor any jurisdiction in this or any other court to order the same; that a writ of mandate, if granted, could not be enforced, and would be unavailing; and in such cases a writ will not issue. (*Board of Education v. Common Council*, 128 Cal. 372, [60 Pac. 976].) No agreement of parties can be invoked to call for a decision of what to them, or either of them, is merely a moot question, and courts should not render judgments which cannot be enforced by any process known to the law. (*Johnson v. Malley*, 74 Cal. 432, [16 Pac. 228].)

It appears that the parties to this litigation have no rights which can be affected by the reversal of the order; that the defendant possessed no right to make any levy for the fiscal year 1903 at the date of the appeal herein; and that the superior court has no authority to render any judgment in the premises. Any opinion that we might give upon the merits of plaintiff's application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute any adjudication of the rights of the parties. (*Foster v. Smith*, 115 Cal. 613, [47 Pac. 591].)

Without determining any of the questions involved, for the reasons above suggested, and upon the authority of *Foster v. Smith*, 115 Cal. 613, [47 Pac. 591], the appeal in this case is dismissed.

Gray, P. J., and Smith, J., concurred.

[No. 28. Second Appellate District.—July 14. 1905.]

JOHN H. GAY, Appellant, v. M. R. THORPE, Justice of the Peace, Respondent.

PROHIBITION—CONTEMPT PROCEEDINGS BY JUSTICE OF THE PEACE—DEPOSITION OF WITNESS IN SUPERIOR COURT—REFUSAL TO OBEY SUBPOENA—JURISDICTION.—A deposition of a witness to be taken in an

action pending in the superior court is a proceeding in that court which can alone punish a disobedience to a subpoena for such witness, and a justice of the peace before whom the deposition is taken has no jurisdiction to punish such disobedience as a contempt, and prohibition will lie to restrain the justice from so doing.

APPEAL from an order of the Superior Court of San Diego County denying a writ of prohibition. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

L. L. Boone, and Oscar A. Trippett, for Appellant.

Valentine & Newby, and Victor E. Shaw, for Respondent.

ALLEN, J.—This is an appeal from an order of the superior court of San Diego County denying appellant's application for a writ of prohibition against respondent. The record discloses that on March 20, 1903, there was an action pending in said superior court in which case notice was duly served upon defendant, properly supported by affidavit, to take his deposition. This notice and affidavit were filed with respondent, as justice of the peace for said county, and he issued a subpoena requiring defendant to appear on a day specified and give his deposition. The defendant disobeyed such subpoena. Upon an affidavit being filed, a warrant of arrest was issued by the justice, directing the defendant to be brought into the presence of said justice to answer the charge of contempt. Appellant thereupon applied to the superior court of San Diego County for a writ of prohibition, commanding the respondent justice to appear before such court and show cause why he should not be restrained from further proceedings in said matter. Upon the hearing of this application, the same was denied. This was error.

The taking of a deposition is a part of the proceedings in the court for whose use the evidence is sought to be taken. One who is a witness summoned to attend and give his deposition in an action is certainly a person connected with a judicial proceeding before a court. His conduct in failing to attend in obedience to a subpoena is therefore a matter which can be controlled by the court; and if so, the control can be made effective only by the existence of the power to

punish the disobedience. (*Burns v. Superior Court*, 140 Cal. 11, [73 Pac. 597].) The taking of a deposition to be used on the trial of the cause is a proceeding in the cause. (*Crocker v. Conrey*, 140 Cal. 217, [73 Pac. 1006].) The jurisdiction of courts of equity, having been given to the superior court by the constitution, cannot be taken away by statute. (*Tulare v. Hevren*, 126 Cal. 228, [58 Pac. 530]; *Burns v. Superior Court*, 140 Cal. 11, 73 Pac. 597.) The same rule would seem to apply to the powers necessary to the exercise of this jurisdiction. (*Burns v. Superior Court*, 140 Cal. 11, [73 Pac. 597].) The refusal of a witness in a proper case to attend and give his deposition before a notary is one of the contempts of court defined by section 1209 of the Code of Civil Procedure. (*Crocker v. Conrey*, 140 Cal. 215, [73 Pac. 1006].) Every court of general jurisdiction has inherent power to punish for contempt persons who obstruct or interfere with its proceedings. (*Ex parte Terry*, 128 U. S. 303, [9 Sup. Ct. 77].) That one may not be put in jeopardy a second time for the same offense is a right guaranteed by the constitution. Were the statutes to be so construed as to give to a justice of the peace acting for the superior court in the matter of taking depositions power to punish for contempt the disobedience of a subpoena issued in such proceedings by the justice, it would be to say that the justice of the peace was given a power the exercise of which would be to defeat and destroy the power reposing in the superior court in the first instance. We are of opinion that the statutes do not contemplate that the superior court should be shorn of any of its inherent power, and therefore no jurisdiction rests within the justice of the peace to punish for contempt the disobedience of the subpoena issued by respondent, and the writ should have been granted.

The order and judgment of the superior court denying the writ are reversed.

Gray, P. J., and Smith, J., concurred.

[No. 18. Second Appellate District.—July 17, 1905.]

M. Y. KELLAM, Respondent, v. A. W. BRODE, and L. D. BRODE, Appellants.

PROMISSORY NOTE—PAYMENT OF INTEREST IN ADVANCE—PRIMA FACIE EVIDENCE—GIFT OF CREDIT UPON PRINCIPAL—TIME NOT EXTENDED.

—Although the general rule is that the payment of interest in advance is *prima facie* evidence of a binding contract to delay the time of payment of the principal of a promissory note, yet such *prima facie* evidence may be overcome by proof that the facts were otherwise. Where there is evidence to sustain a finding that the payment of the interest in advance was in sole consideration of a contemporaneous gift of a credit of a larger sum upon the principal, and that there was no agreement extending the time of payment, an action upon the note before the expiration of the period of interest credited is not premature.

ID.—EXCLUSION OF TESTIMONY IN SUPPORT OF ANSWER—ERROR CURED ON CROSS-EXAMINATION.—The erroneous exclusion of the testimony of a defendant in support of his answer was cured by the admission of the same testimony on his cross-examination.

ID.—DEFENSE OF ASSUMPTION OF NOTE AS FIRM INDEBTEDNESS—ERROR IN EXCLUDING EVIDENCE.—Where the defense was that the note in suit was given for firm indebtedness, and that plaintiff, subsequent to its execution, assumed all of the indebtedness of the firm, including said note, and plaintiff admitted an agreement to pay a specified sum which included a number of individual notes of members of the firm, it was error to exclude evidence as to what notes or indebtedness were in fact paid under the assumption as being material in determining whether or not the note sued on was an obligation assumed by the plaintiff.

ID.—FINDING AGAINST EVIDENCE—EXECUTION OF NOTE AFTER DATE—REPRESENTATION AS TO FIRM DEBT—ESTOPPEL.—Where the testimony shows without conflict that one of the defendants executed the note long after its date, under the inducement of a representation by plaintiff that it was for the indebtedness of the firm of which such defendant was to become a member, the plaintiff is estopped to deny as against such defendant that it was a firm obligation, to which the subsequent assumption of firm indebtedness by plaintiff was applicable, releasing such defendant therefrom, and a finding to the contrary is against the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.
Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, and J. F. Conroy, for Appellants.

The action was prematurely brought, the interest having been paid in advance for two years, and the action was brought before the expiration of that time. (*Skelly v. Bristol Savings Bank*, 63 Conn. 83, 38 Am. St. Rep. 340, 26 Atl. 474; *Scott v. Saffold*, 37 Ga. 384; *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 64 Minn. 439, 67 N. W. 350; *Crosby v. Wyatt*, 10 N. H. 318; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *People's Bank v. Pearsons*, 30 Vt. 714; *Woodburn v. Carter*, 50 Ind. 376.) The findings are against the evidence.

R. L. Horton, for Respondent.

The action was not prematurely brought, there being no agreement to extend the time. The mere payment of interest in advance is not conclusive. Since the amendment of 1874 to section 1693 of the Civil Code an agreement to extend time should be in writing or by an executed oral agreement, and not otherwise. (*Henehan v. Hart*, 127 Cal. 656, 60 Pac. 426; *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581; *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88; *Cashman v. Harrison*, 90 Cal. 297-304, 27 Pac. 283.) Payment was demanded and refused on the last day, and this authorized the action thereafter on that day. (*Hibernia etc. Society v. O'Grady*, 47 Cal. 579; *Belloc v. Davis*, 38 Cal. 242; *Woodward v. Brown*, 119 Cal. 283, 300, 63 Am. St. Rep. 108, 51 Pac. 2, 542.) The findings are sustained by the evidence. Evidence was not admissible to vary the obligation of the note. (*Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Shriver v. Lovejoy*, 32 Cal. 574; *Southern California etc. Bank v. Wyatt*, 87 Cal. 616, 25 Pac. 918; *California etc. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38; *Bradford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083.)

ALLEN, J.—Defendants appeal from a judgment and order denying a new trial.

The complaint was filed March 19, 1902, declaring upon a promissory note, payable to plaintiff and signed by defendants, dated June 15, 1899, due in one year, for twelve

hundred dollars, with interest at seven per cent per annum payable semi-annually. Upon the note appeared the following indorsements:—

“Six months int. paid on within note; \$42.00. M. Y. KELLAM.

“March 19, 1900. Paid Two Hundred Dollars on within note. M. Y. KELLAM.

“March 19, 1900. Int. paid in advance, \$140.00; amount for two years from date. M. Y. KELLAM.”

In an amended complaint it is alleged that the last indorsement was entered through mistake, which defendants knew or suspected at the time; that the payment of interest was only up to December 15, 1901, and not later, and a reformation of the indorsement to that effect was asked. The answer denies any mistake, and alleges that on March 19, 1900, in consideration of the payment of two hundred dollars, and the sum of one hundred and forty dollars advanced as interest, plaintiff agreed to extend the time of payment two years from and after March 19, 1900. By way of further answer, the defendants allege that the note sued on was given in consideration of a debt of the Electric Supply and Fixture Company, a corporation, of which plaintiff had notice; that on the 19th of March, 1900, the plaintiff, for a valuable consideration, assumed and agreed to pay all the indebtedness of said Electric Supply and Fixture Company, including the note.

The court found such indorsement of March 19, 1900, was not improperly indorsed by mistake; that the same does truly express the intention of said party, and that the interest was paid in advance to March 19, 1902. The court further finds that there was no agreement to any extension of time for the payment of said note, and the same was not then and never has been extended.

Judgment was entered in favor of the plaintiff and against defendants for one thousand dollars, with interest from December 15, 1901.

Appellants' first point discussed is that the action was prematurely brought; that the receipt of interest to March 19, 1902, amounted to an agreement to extend the time of payment to that date, and that being established the defendants had the whole of that day within which to pay the note and

were not in default when the action was commenced. The trial court, however, has found, and there was some testimony upon which such findings are supported, that while the interest was actually received and paid in advance to March 19, there was no agreement to extend time of payment on account thereof.

The general rule is, "that the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment." (*Skelly v. Bristol Sav. Bank*, 63 Conn. 83, [38 Am. St. Rep. 340, 26 Atl. 474].) "The inference is irresistible that where a creditor receives interest in advance there is a contract to extend the time of payment during the period for which interest is paid." (*Woodburn v. Carter*, 50 Ind. 376.) In these and many other decisions the inference to be derived is declared, while in others a *prima facie* case is said to be established by the proof of such facts. But such inferences and *prima facie* evidence may be overcome by proof that the facts are otherwise. It is entirely competent for parties to actually pay and receive money by way of interest in advance, upon an understanding that it should not affect the right to sue upon the original promise. This, in effect, is what the court below found, when it found that, notwithstanding the payment, there was no agreement to extend time. These findings were in line with plaintiff's testimony, that the credit of two hundred dollars was a gift, and that "when I struck off the \$200 I gave him that, and he suggested then that he would pay me two years' interest in advance and I said 'All right,' and set it down on the note that way." The court appears to have accepted plaintiff's testimony as to the incidents of the transaction, and to have determined that the consideration of the payment of interest in advance was based upon the gift of two hundred dollars, and not a consideration for a new contract extending time of payment. In *Hellier v. Russell*, 136 Cal. 144, [68 Pac. 581], the principle is determined that the mere payment of interest in advance, pursuant to a stipulation in the original obligation so to do, is not even *prima facie* evidence of an intent to create a new contract.

It is further insisted by appellants that the court erred in excluding testimony of A. W. Brode, tending to show that the note set out in the complaint was given on account of the indebtedness of the Electric Supply and Fixture Company,

which testimony was in support of the allegation of the answer. This was error; but it was cured by the admission of the same testimony upon cross-examination of the witness, and we are unable to see any prejudice resulting from its exclusion in the examination-in-chief. Error is claimed by reason of the refusal of the court to admit testimony with reference to the character, payment, and consideration of certain other notes presented to the witness A. W. Brode. It was certainly material, in determining whether or not the note sued on was an obligation assumed by the plaintiff, to receive and consider evidence as to what notes or indebtedness were in fact paid under such assumption, and in discharge of what plaintiff admits was an agreement to pay about seven thousand eight hundred dollars. While some of the notes about which inquiry was sought were admitted to be individual obligations of the makers, yet they formed a part of the notes claimed by plaintiff to have been paid pursuant to the assumption of the firm indebtedness. We are unable to see how the court could determine the vital question in this case, which was with reference to the assumption by plaintiff of the note in suit, without going into an inquiry as to what was actually paid, and the character of the notes so paid, together with the amount. The refusal of the court to admit the evidence with relation to these notes was error, nor was it cured by subsequent statements in relation thereto.

It is insisted further by appellants that the finding of the trial court, that the note set out in the complaint was not the indebtedness of the Electric Supply and Fixture Company, is unsupported by the evidence. This is true, in so far as defendant L. D. Brode is concerned. While the answer admitted the execution of the note at its apparent date, the testimony, without contradiction, shows that more than two months elapsed after its execution by A. W. Brode before it was signed by L. D. Brode; and further, the uncontradicted testimony is that when it was signed by L. D. Brode, and as an inducement to procure his signature thereto, plaintiff represented that the note did represent a debt of the Electric Supply and Fixture Company, of which firm defendant was to become a member; and that such representations were believed and were the sole consideration for its execution by L. D. Brode. This being true, as between plaintiff and defendant L. D. Brode, the note became a firm obligation.

Plaintiff having asserted that it was a firm debt, and defendant having acted upon his belief in the truth thereof, plaintiff is estopped to deny that it was, and is, a firm debt; and having, for a good consideration, assumed in his contract with L. D. Brode to pay all obligations of the Electric Supply and Fixture Company, this note became a part of the liability so assumed, and defendant L. D. Brode ceased to be bound thereby.

Judgment and order reversed, and cause remanded for a new trial.

Gray, P. J., concurred.

Smith, J., concurred in the judgment.

A petition for a rehearing of this cause was denied by the district court of appeal on August 15, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on September 14, 1905.

[Crim. No. 5. First Appellate District.—July 18, 1905.]

THE PEOPLE, Respondent, v. WILLIAM A. SMALL, Appellant.

CRIMINAL LAW—OBTAINING MONEY BY FRAUD—INSUFFICIENT VERDICT—JUDGMENT NOT SUSTAINED.—Under an information charging the crime of knowingly and designedly by false and fraudulent representations defrauding a person named of over one hundred dollars in money a verdict finding the defendant "guilty of the crime of felony, to wit, obtaining money by false pretenses," does not respond to the issue, nor show any crime, and cannot sustain a judgment of imprisonment.

ID.—PROVINCE OF JURY—LEGAL DEFINITION OF CRIME.—The words "the crime of felony" may be omitted from the verdict. It is not the province of the jury to determine the legal definition of the acts claimed to constitute a crime.

ID.—JEOPARDY—DISCHARGE OF DEFENDANT.—The defendant having been placed in jeopardy by trial under a valid information, was entitled to be discharged after the receipt and record of an insufficient verdict.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Bert Schlesinger, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

COOPER, J.—Judgment of imprisonment in the state prison was entered against defendant under an information charging him with having obtained possession of one hundred and three dollars by certain false and fraudulent representations set forth therein. He made a motion for a new trial, which was denied, and this appeal is from the judgment and order denying said motion. His contention is that the verdict is insufficient to sustain the judgment, and hence that he should be discharged.

The information charges the offense defined in section 532 of the Penal Code, which provides: "Every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property, . . . is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." It is not necessary to give the information in full, or to enter into an analysis of it. It is sufficient for the purposes of this case that, in our opinion, it sets forth sufficient facts to constitute the crime defined in the section. It shows that the defendant unlawfully, knowingly, fraudulently, and with intent to cheat and defraud, obtained from one Perry one hundred and three dollars by certain false and fraudulent representations to the effect that he was the owner, free from all encumbrances or liens, of certain household furniture, which representations were untrue. The defendant pleaded not guilty to the offense charged.

The jury had the right, as the evidence might have justified, to find the defendant guilty of the offense charged in the information, or guilty of knowingly and designedly, by false and fraudulent representations or pretenses, of defrauding the said Perry of a less sum than one hundred and three dollars, or less than fifty dollars, or not guilty. The verdict

was: "We, the jury, find the defendant William A. Small guilty of the crime of felony, to wit: obtaining money by false pretenses."

This verdict is not responsive to the issue before the court, and is not sufficient to show that defendant ever committed any crime. The words "of the crime of felony" may be omitted, as it is not the province of the jury to say or determine the legal definition of the acts claimed to constitute a crime. (*People v. Holmes*, 118 Cal. 448, [50 Pac. 675].) We then have a verdict finding: "Defendant guilty of obtaining money by false pretenses."

There is no section of the Penal Code making such act of itself a crime. A party must *knowingly* and *designedly*, by false or fraudulent representations or pretenses, defraud a person. It is not found or stated what the false pretenses were, and no reference is made to the information. "But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict." (Pen. Code, sec. 1162.) The verdict is not a special verdict, nor is it a finding against the defendant on the issue. The issue was as to whether or not the defendant did the things charged against him in the information, or enough of them to constitute a crime. How could any one tell from this verdict how much money defendant obtained, or what he did to obtain it?

If the verdict, instead of responding to the issue in the record, finds upon some other, or is silent on some element of the offense, it will not sustain a judgment. (1 Bishop's New Criminal Procedure, sec. 1005.)

In *People v. Cummings*, 117 Cal. 497, [49 Pac. 576], the information charged defendant with the crime of obtaining the promissory note of C. Schnelle of the value of one hundred and seventy-five dollars by certain false and fraudulent pretenses. The verdict found that "The defendant is guilty of defrauding C. Schnelle of the note of one hundred and seventy-five dollars in the indictment mentioned." It was held that the verdict was insufficient, and that there was no such crime, for the reason that the verdict did not find as to the false and fraudulent representations in the indictment charged.

So in the case at bar, there is no finding that defendant *knowingly* and *designedly* obtained any money, and no finding as to the amount.

In *People v. Tilley*, 135 Cal. 62, [67 Pac. 42], the defendant was charged with the crime of receiving stolen property in the language of the statute. The verdict was: "We, the jury in the above entitled case, find the defendant, Chas. H. Tilley, guilty of receiving stolen property." The verdict was held insufficient. It was said that there did not appear any intent to find defendant guilty as charged in the information, and the court said: "It may be that the jury were satisfied from the evidence that the defendant was guilty of the receiving of the stolen goods, but were not satisfied either of his knowledge of their being stolen, or as to the intent of personal gain; and that they accordingly found the fact of which they were satisfied, and omitted to find the others of which they were not satisfied."

In the case at bar the jury were evidently satisfied of the fact that defendant obtained money by false pretenses. They were not satisfied that he was guilty of the offense charged, because they did not say so. They were not satisfied as to the amount of money defendant obtained, nor as to the fact that he knew the pretenses were false, for they did not say so. A person might, in the utmost good faith, represent himself to be the owner of certain property, and upon such representation procure money; and yet as a fact the representation might turn out to be untrue. It is not a crime to procure money by false pretenses, unless the party making them knew, or in law would be charged with knowledge, of their falsity.

The defendant has been placed in jeopardy. (Pen. Code, sec. 1023; *People v. Terrill*, 132 Cal. 500, [64 Pac. 894].) He made a motion to be discharged after the verdict was received and recorded. He was entitled to such discharge under the ruling in *People v. Tilley*, 135 Cal. 62, [67 Pac. 42].)

The judgment and order are reversed, and the court directed to discharge the defendant.

Hall, J., and Harrison, P. J., concurred.

[No. 22. Second Appellate District.—July 20, 1905.]

WILLIAM NILES, Appellant, v. M. G. GONZALES et al.,
Respondents.

ACTION FOR RENT—LEASE IN NAME OF AGENT—PAYMENT OF RENT TO PRINCIPAL.—An agent authorized to execute a lease and to cause rents to be paid to the principal who executes it in his own name without any title in himself, and who has directed the rent to be paid to the principal, who received it until the property was sold to the tenant's wife, cannot maintain an action in his own name to recover rent.

ID.—EVIDENCE OF AGENCY.—A lease formerly made by the principal to the same tenant, her receipt of the rent, her contract with the plaintiff, and her deed to the tenant's wife were all competent as tending to establish the agency alleged in the answer, the authority of the principal, and its exercise by the plaintiff as agent.

ID.—ESTOPPEL OF TENANT—PROOF OF AGENCY OF LESSOR.—The proof of the agency of the lessor for a principal not named in the lease was not in furtherance of an attempt of a tenant to dispute a landlord's title.

ID.—ESTOPPEL OF AGENT AND PRINCIPAL.—The acts of the agent in representing himself only as agent for the principal, and declaring that he was executing the lease for her, and in not asserting ownership in himself, but directing the rent to be paid to her, estops him to deny that the lease was her contract, and that in executing it his intention was to bind her, and her authority for the lease and reception of rent accordingly would estop her from denying an execution in her behalf.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

A. B. McCutchen, and Ward Chapman, for Appellant.

The lessee could not dispute the lessor's title. (*Tewksbury v. Magraff*, 33 Cal. 237; *Peralta v. Ginocchio*, 47 Cal. 459; *Holloway v. Galliac*, 47 Cal. 475; *Eckles v. Booco*, 11 Colo. 522, 19 Pac. 465; *Ashton v. Golden Gate Lumber Co.*, (Cal.) 58 Pac. 1; *Alwood v. Mansfield*, 33 Ill. 452; *Stott v. Rutherford*, 92 U. S. 107; *Bedford v. Kelly*, 61 Pa. St. 491; *Lucas v. Brooks*, 18 Wall. 436; *Taylor v. Eckford*, 11 Smedes & M. 21; *Russell v. Irwin*, 38 Ala. 44.)

J. Wiseman McDonald, for M. G. Gonzales, Respondent.

The defendant was not estopped to show the title and authority of the principal. He had possession from the principal when the lease in question was executed in the name of the agent for the principal's benefit. (*Tewksbury v. Magraff*, 33 Cal. 245; *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129; *Dam v. McGrew*, 82 Cal. 136, 23 Pac. 41; *Oneto v. Restano*, 89 Cal. 63, 26 Pac. 788; *Davidson v. Ellmaker*, 84 Cal. 22, 23 Pac. 1026; *Pacific Mut. Life Ins. Co. v. Stroup*, 63 Cal. 150.)

ALLEN, J.—This action to recover rent was originally commenced in a justice's court and certified to the superior court, upon a verified answer being filed showing that questions of title and possession to real property were involved. Judgment in superior court went for defendant. This appeal is from an order denying a new trial, and is based upon a statement.

Plaintiff's action was upon a written lease alleged to have been entered into between plaintiff and defendant. The answer admits the execution of a lease as set out in the complaint, but avers that as agent of Mrs. Tarr, the owner of the premises, plaintiff executed said lease for her and in her behalf, and denies that plaintiff was ever the owner of the premises. Alleges further that the rent had been paid to the said Mrs. Tarr up until the date when said owner sold said premises to the wife of defendant.

The finding of the court that the lease was made between the defendant and Mrs. Tarr was within the issues, and ample evidence appears in the statement to support such finding. It is insisted, however, that this evidence was improperly admitted; that it was in furtherance of an attempt of a tenant to dispute a landlord's title. We do not so understand the object of such proof. The lease of Mrs. Tarr formerly made, her receipt for the rent, the deed to Mrs. Gonzales, the contract between plaintiff and Mrs. Tarr, each and all were competent as tending to establish the alleged agency, the authority of Mrs. Tarr to create the same, and its exercise by plaintiff. While as a general rule those only are bound by a written contract to sign it, and others cannot be

held whose names do not appear therein, yet an exception to this rule exists when evidence is admitted to show that it also binds another who has authorized its signing, because the act of the agent in signing an agreement in pursuance of the authority is in law the act of the principal. (*Estrella Vineyard Co. v. Butler*, 125 Cal. 238, [57 Pac. 980].) The contract between plaintiff and Mrs. Tarr in reference to the sale contains a general authority to plaintiff to lease and assign same, and to cause all rents to be paid to Mrs. Tarr. The act of plaintiff in representing himself as agent only, having the rental paid to Mrs. Tarr, his concealment of his own interest in the premises, and declaring that he was executing the same for Mrs. Tarr, certainly ought to estop him from denying that the contract was that of Mrs. Tarr, and that his intention in its execution was to bind her. Her authority for him to lease and the receipt of the rent should estop her to deny an execution in her behalf, were she even seeking to avoid the same, which she is not. Plaintiff had no interest in the property at the date of the sale to Mrs. Gonzales and seeks to establish none, had no authority at any time to receive the rents, and nothing appears in the record indicating any right of the plaintiff to maintain an action for any part of the claim sued upon.

We find no error in the record, and the order appealed from is affirmed.

Smith, J., and Gray, P. J., concurred.

[No. 21. Second Appellate District.—July 20, 1905.]

ALEXANDER McRAE, Respondent, v. CHARLES ERICKSON et al., Appellants.

NEGLIGENCE—MASTER AND SERVANT—INJURY OF SERVANT IN RAILROAD TUNNEL—INSTRUCTION—COMPLETED PART OF TUNNEL—APPLIANCE—SAFETY.—Where the plaintiff was injured while working in a railroad tunnel from the falling of a rock from the side of a track laid therein, it was proper in effect to instruct the jury that where a permanent tunnel is being driven into a mountain to furnish a permanent bed for a railroad, the completed portion of the tunnel in which substantially all the work of excavation is performed, in

order to render the tunnel of the size and capacity provided for in the plans and specifications, becomes an appliance and means furnished by the master by which the remaining work is to be prosecuted, and if so completed the employees of the defendants were obligated to use ordinary care to render such completed portion a safe place in which to work, and to keep it in a condition reasonably fit.

ID.—COMPLETION TO TEMPORARY GRADE OF TRACK.—The excavation of the tunnel to the temporary grade of a track laid therein was a substantial completion of that portion of the tunnel.

ID.—CONTRIBUTORY NEGLIGENCE—IMMINENT DANGER—INSTRUCTION—CHOICE OF WRONG DIRECTION.—Where there was no evidence to show that the plaintiff was brought into his dangerous position by any negligence of his own, it was proper to instruct the jury in effect that a person in imminent danger is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger, and that if plaintiff found himself in imminent danger and had not time to stop and consider and determine the better course to pursue, his choosing to run out toward the portal instead of back toward the bend was not negligence on his part, even though in so doing he may have run right under the falling rock instead of away from it.

ID.—NEGLIGENCE A QUESTION OF FACT.—The question of negligence is commonly a question for the jury, and it is only in extreme cases that this court would be justified in disregarding the verdict of the jury.

ID.—EVIDENCE—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.—A physician in charge of defendant's hospital whose services were remunerated by assessments upon the wages of the men employed was in effect employed by the plaintiff, and answers made by the plaintiff to questions asked of him by the physician as to how the injury was sustained, for the purpose of determining his condition as preliminary to treatment, were privileged communications.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial
M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Bicknell, Gibson & Trask, for Appellants.

Fred E. Burlew, and Edwin A. Meserve, for Respondent.

SMITH, J.—Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial. The suit is for damages for injuries received by plain-

tiff while working for defendants in the construction of a tunnel for the Southern Pacific Railroad Company on the line between Los Angeles and Ventura counties. The general course of the tunnel is eastward from the portal, or entrance to it. The work had been completed and permanently timbered some distance into the mountain, and for some distance beyond that—variously stated, but which we may call about fifty feet—the tunnel had been completed, with the exception of timbering, down to what may be called the “temporary grade.” Over this there was laid a temporary track, reaching to the end, or “toe,” of what is called by the witnesses the “muck pile”—a point distant about eighteen feet from the face of the tunnel—by which is meant the cross-section of the tunnel at the end of the part above described. The precise difference of level between the regular grade and the temporary grade is not stated, but was probably a few inches only; and, in the language of one of the witnesses, this portion of the tunnel had been completed, except for the timbering, and “taking up the grade”; by which is meant, completing the excavation to the regular grade.

At the time of the accident the plaintiff was engaged on the south side of the tunnel in loading a car from the muck heap, and was injured by a rock falling from the side of the tunnel between him and the portal as he attempted to escape in that direction.

The jury were instructed (among other instructions), in effect, that where a permanent tunnel is being driven into a mountain to furnish a permanent bed for a railroad, the completed portion of the tunnel, as fast as completed, becomes an appliance and means furnished by the master, by which the remaining work is to be prosecuted; and that if the jury found that any portion of the tunnel was thus completed, the employees of defendants were obligated to use ordinary care to render such completed portion a safe place in which to work, and to keep such completed portion in a condition reasonably safe, etc. And in definition of the terms used, it is added by the court: “When I say ‘completed,’ I desire to be understood as saying, when substantially all the work of excavation is performed, in order to render the tunnel of the size and capacity provided for by the plans and specifications.”

This instruction was based upon the decision in *Hanley v California Bridge etc. Co.*, 127 Cal. 232, [59 Pac. 577]; and one of the points urged by the appellants is, that "the tunnel at the point from where the rock fell was uncompleted," within the sense of the term used in the instruction, and in the case cited. But we are of the opinion that the excavation of the tunnel to the temporary grade was a substantial completion of that portion of the tunnel, within the meaning of the instruction, and within the reason of the decision.

Another objection urged by the appellants was to the following instruction: "When a person is in imminent danger, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger. So if a party in imminent danger has two ways open to him, but has not the time to stop and investigate, and determine which is the right or safe way, and which is the wrong or unsafe way, his choosing the latter is not, under the circumstances, negligence on his part. So, if you should find from the evidence in the case that McRae found himself in imminent danger or had reasonable ground to believe that he was in such danger, and had not time to stop and consider and determine the better course to pursue, then you are instructed that his choosing to run out toward the portal instead of back toward the bench was not negligence on his part, even though in so doing he may have run right under the falling rock instead of away from it."

The objections urged to this instruction are that it should be qualified with the provisos: That plaintiff acted in the emergency as any ordinarily prudent man would have been likely to act under the same circumstances, and that the dangerous situation was brought about by the plaintiff's negligence. But with regard to the latter qualification, there was no evidence in the case tending to show that the plaintiff was brought into his dangerous position by any negligence of his own; and from the evidence and the verdict, it must be assumed that the situation was the result of the negligence of the defendants. Nor are we prepared to hold, in the absence of negligence on the part of the plaintiff, that it is a material question whether the dangerous situation of plaintiff was the result of defendants' negligence, or otherwise.

We are also of the opinion that the other qualification contended for by appellants is equally untenable. The principle expressed in the instruction is based upon the familiar and well-known fact that in circumstances of imminent danger the ordinarily prudent man commonly acts without prudence, and that it is only the exceptional man who can be relied upon, under such circumstances, to retain his presence of mind. Or, in other words, the rule is based on an almost universal human infirmity.

It is objected, also, that the evidence was insufficient to justify the verdict, in that it affirmatively appears that the defendants were not guilty of negligence, and that the plaintiff was guilty of contributory negligence. But the question of negligence is commonly a question for the jury, and it is only in extreme cases (of which this is not one) that this court would be justified in disregarding the verdict. It may be added that the only claim of contributory negligence is that when the imminence of the danger from the falling rock became apparent, the plaintiff, like the other employees present, attempted to escape in the wrong direction.

The remaining point urged is, that the court erred in excluding the testimony of Dr. Hitt as to a statement made to him by the plaintiff at the defendants' hospital, where he had been taken for treatment; and this is objected to on the two grounds: That there is nothing in the record to indicate that the witness was acting professionally, or with a view to treating plaintiff, or that the information was obtained with a view to treatment; and that the information was, in fact, not "necessary to enable him to prescribe or act for the patient."

But the former point, we think, is obviously untenable. The witness was a physician and surgeon, and as such was in charge of the defendants' hospital, and his services were remunerated by assessments upon the wages of the men; so that he was in effect employed by the plaintiff. He examined the plaintiff as a physician, and the plaintiff knew that he was examining him as such, and the information sought was obtained from the plaintiff at the time he was examining him, or some time during the day. The court below, we think, was right in holding that the communication was made to the witness in the course of professional employment.

As to the remaining objection. The question asked the witness was: "If Mr. McRae made any statement to you, explaining how the rock fell and how it hit him," to which he answered: "He did." The witness was then asked: "Now, state whether he told you how the rock came down and from whence it came"; and the question being objected to, the witness testified that the statement referred to "had nothing to do with his [the plaintiff's] treatment, nor with the examination of him for the purpose of determining his physical injuries"; that "it had no relation whatever to his treatment"; that "it was customary in the hospital to get a record from the patients as to how these things occurred." The witness was then asked by the court: "Was it a part of the history of the case," etc. To which he answered: "Why, I simply asked him how it occurred—how did you get this injury—no matter if it is a scalp wound, or mashed finger, or whatever it may be, it is natural to inquire how it occurred; and in connection with that he reported to me." The objection to the question was thereupon sustained, and the appellants excepted. The court was not informed as to the effect of the statement sought, otherwise than by the questions quoted above; and from these it cannot be very clearly determined what the statement would have been. If it was as indicated by the first question, the information sought was apparently of a character necessary to the proper treatment of the patient. But information as to the direction or point whence the rock came would seem to have been unnecessary for such purpose; and to this extent, if we have regard to the most obvious sense of the provision of the statute under consideration, the objection of the respondent would seem to have been well taken. But to give to the statute this narrow construction would equally exclude from its application many if not most of the answers to questions usually put, and properly and necessarily put, by competent physicians to patients in cases of this kind, in order to enable them to act for their patients. This, we think, would be to defeat the obvious purpose of the act, which, it is said, "is to facilitate and make safe full and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammelled by apprehension of their subsequent and enforced disclosure and publication on the witness-stand, to the end that

the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient." (*Will of Bruendl*, 102 Wis. 47, [78 N. W. 169].) Hence, it is said in the case cited (which is also cited by the appellants): "The seal placed on the lips of the physician only relates to 'information necessary to enable him to prescribe for such patient as a physician.' The tendency of all courts has been and should be toward liberal construction of these words to effectuate the purpose of the statute. Thus, it has been held that the word 'necessary' should not be so restricted as to permit testimony of statements or information in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain information, so that it was not strictly necessary. (*Sloan v. New York Central R. R. Co.*, 45 N. Y. 125; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, [36 Am. Rep. 617]; *Renihan v. Denmin*, 103 N. Y. 573, [57 Am. Rep. 770, 9 N. E. 320].)" In the case cited, under this liberal construction of the act, the testimony of physicians was admitted upon the ground that the examination of the patient was not made for the purpose of prescribing for her, the court saying: "We hold, therefore, that the information obtained by the physicians at the interview of September 18, 1896, was not necessary, and was not obtained, for the purpose of enabling them to prescribe for the testatrix as physicians." Though the precise question has not been determined by the supreme court of this state, the same view seems to have been commonly taken. Thus, in the case of *Freel v. Market St. Cable Ry. Co.*, 97 Cal. 46, 47, [31 Pac. 730], the testimony of a medical witness as to "information acquired by him . . . while visiting and prescribing for" plaintiff was excluded. So in *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 166, [47 Pac. 1019], the opinion of the physicians, "based upon facts ascertained by them during such medical attendance," was excluded; and so *Estate of Nelson*, 132 Cal. 187, [64 Pac. 294], there is a like ruling as to information of a physician "acquired by him from the decedent, and from observing him while he was in attendance upon him for the purpose of prescribing for him as his physician."

We are therefore of the opinion that the view of the court below in this case was correct, and that the intention of the

statute is to exclude all statements made by a patient to his physician while attending him in that capacity for the purpose of determining his condition. Nor does this construction do violence to the language of the act liberally construed; which we think is to be understood as forbidding a physician to be examined "as to any information acquired in attending the patient, *the acquisition of* which was necessary (or which it was necessary for him to acquire) *in order* to enable him to prescribe or act for the patient." Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge; for it would be obviously unreasonable to require of the patient the exercise of any judgment with reference to the propriety of the questions asked by his physician, except, possibly, in cases where the materiality of the question is obviously apparent.

We are of the opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

Gray, P. J., and Allen, J., concurred.

[No. 17. Second Appellate District.—July 20, 1905.]

SQUIRE MUNROE, Respondent, v. MARGARET M. FETTE, THOMAS BEATTY, and JANE M. BEATTY, his wife, Appellants.

REPLEVIN—ORDER GRANTING NEW TRIAL TO PLAINTIFF—COMMUNITY PROPERTY—ERRONEOUS INSTRUCTION—RATIFICATION OF WIFE'S ACTS.—In an action of replevin an order granting a new trial to the plaintiff, after judgment for the defendants, will be sustained, where it appears that he claimed title to the property as community property, and an erroneous instruction was given as to his ratification of acts of his wife with defendants inconsistent with his claim of title, which omitted all question as to the knowledge of the plaintiff in relation to the transaction.

ID.—ISSUE AS TO A DEFENDANT WITHHOLDING POSSESSION—RECORD—NEW TRIAL.—Where the fact of a particular defendant withholding possession from the plaintiff was in issue, and the whole of the testimony does not appear in the bill of exceptions, it cannot be said that the new trial was improperly granted as to such defendant.

APPEAL from an order of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

J. G. Rossiter, and Flint & Barker, for Appellants.

D. Allen, Trusten P. Dyer, and Hunsaker & Britt, for Respondent.

ALLEN, J.—Without noticing the many other assignments of error raised by the bill of exceptions, and on consideration of which the court granted a new trial, it is sufficient upon this appeal to call attention to instruction No. 10, which reads as follows: "You are instructed that if you find that certain of the property in question was held by Mrs. Stella Munroe under the lease from Barker Brothers with the privilege of purchasing the same, and that defendants furnished money as a part of the purchase price of said property described in the complaint to pay the balance to be paid thereon to said Barker Brothers necessary to secure the title to said property, and that plaintiff claims title to said property so purchased from said Barker Brothers, or any interest therein, by reason of such payment by Mrs. Stella Munroe to them from moneys so furnished by defendants, or either of them, without offering to refund said moneys, then said plaintiff by so doing ratified the sale to defendants by which said money was derived."

This instruction proceeds upon the theory that the fact of part payment by plaintiff's wife from the proceeds of the sale to defendants precluded plaintiff from claiming the property as community property, without offering to refund to defendants the amount so paid and applied by the wife to the purchase price, omitting therefrom all question as to the knowledge of plaintiff in relation to the transaction. That plaintiff may be held to the ratification of an act, it is essential that he have knowledge, or the equivalent, of the facts concerning the transaction. A ratification supposes a knowledge of the thing ratified. (*Blen v. Bear River etc. Co.*, 20 Cal. 602, [81 Am. Dec. 132].) "It is an inherent element of ratification that the party to be charged with it must have fully known what he was doing." (*Brown v. Rouse*, 104 Cal. 676, [38 Pac. 507].)

The fact of defendant Fette's withholding possession was an issue. The whole testimony does not purport to appear in

the bill of exceptions, and we cannot say that the new trial was improperly granted as to her.

The court did not err in granting a new trial, and the order is affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 11. Second Appellate District.—July 20, 1905.]

D. H. THOMAS, and H. A. FARRAR, Respondents, v.
BOLSA LAND COMPANY, and BOLSA CHICA GUN
CLUB, Corporations, Appellants.

FLOODING OF LAND—DESTRUCTION OF CROPS—INTERFERENCE WITH DRAINAGE SYSTEM—LIABILITY OF RIPARIAN OWNERS.—Where an owner of land, by an established system of drainage to the ocean, has rendered his land tillable, riparian owners who, by the subsequent erection of dams, have interfered with such drainage system, and caused back-water to rise on such land, to the destruction of crops growing thereon, are liable for the resulting damage.

ID.—ACTION FOR DAMAGES—JOINDER OF PLAINTIFFS—LAND TILLED UPON SHARES.—The owner of the land and one who is engaged in tilling it upon shares, each being interested in the crop destroyed, were properly joined as co-plaintiffs in the action for damages therefor.

APPEAL from a judgment of the Superior Court of Orange County and from an order denying a new trial. J. W. Ballard, Judge.

The facts are stated in the opinion of the court.

Scarborough & Forgy, and Dunn & Crutcher, for Appellants.

F. O. Daniel, and Victor Montgomery, for Respondents.

GRAY, P. J.—This action is brought to recover damages suffered by reason of a dam constructed by defendants, which had the effect to back up and cause certain waters to sub-irrigate and injure and destroy the celery crop of plaintiffs. On a trial without a jury the plaintiffs had judgment for

\$982 and costs. The defendants appeal from the judgment, and from an order denying them a new trial.

The plaintiff Thomas owns a certain forty acres of land in Orange County, upon which the plaintiffs, under an agreement between them for cropping the land on shares, had growing some eleven acres of celery. The story of injuries complained of is aptly told in the findings of the court, the important parts of which are as follows:—

“That the said land is situated about two miles from and above the dam described in said complaint and therein alleged to have been built by the Bolsa Land Company. That said land of the plaintiff Thomas was, as early as the year 1892, to some extent drained by the construction of ditches along and through it, and prior to the construction of said dam had been drained to such an extent as to render it tillable and susceptible of raising, and had raised, good crops of celery and other farm products. That prior to the building of said dam the ditches used in the drainage of the lands of the plaintiffs and other lands contiguous thereto emptied into a natural stream known as Freeman’s River, and from thence into Bolsa Chica Bay, and from said bay through a natural channel and outlet into the Pacific Ocean.

“That prior to the 1st day of October, 1899, the plaintiff A. H. Thomas had expended money in draining said land, and in preparing for, and in reducing the same to cultivation, and in cultivating said land, and in digging and keeping open ditches for the purpose of draining said land into said Bolsa Chica Bay, and had, prior to the building of said dam, drained said land and kept the water off and from under the same by running said water into Bolsa Chica Bay, from which bay it flowed out into the Pacific Ocean by a natural channel, carrying away the surplus water from said lands, by means of said ditches, river and bay and natural channel into the Pacific Ocean.

“That during the year 1899 the plaintiffs planted the land described in the complaint as belonging to the plaintiff Thomas with celery and other crops; that eleven acres of said land were planted with celery, and that plaintiffs were the owners of said crop of celery. That before said celery was planted the land was properly prepared and put in a fit state of cultivation for the planting of celery, and said land was

cultivated in the usual and customary way. That the said crop of celery was growing and maturing up to about the 15th day of December, 1899, and was then worth in the field the sum of eleven hundred dollars, and was worth said sum when it was damaged and destroyed, as herein stated, and had it not been for the building of said dam and the consequent backing of the water in said bay and ditches said celery could have been sold at the time in the field and at harvest time for the sum of eleven hundred dollars.

“That said dam was constructed by the defendants at and in said Bolsa Chica Bay and at the place alleged in said complaint, and was an obstruction in and to the channel of said bay, and prevented the water of said bay from flowing through the natural channel and outlet, and out of the bay into the Pacific Ocean, and as maintained by the defendants the waters of the bay were dammed up and rose in said bay and in said ditches and filled up the drainage ditches and prevented the waters from said ditches and from the land of the plaintiffs from flowing away from said land into the Pacific Ocean, and caused said land to become subirrigated and the celery to become wet, damaged, decayed and destroyed, and to become unfit for market and unsalable, and the said crop of celery was lost to the plaintiffs, except a small portion thereof, which was sold for the sum of one hundred and eighteen dollars, which was all of said crop that could be sold, and was all that could be realized therefor.

“That about the 1st day of November, 1899, and after said crop of celery had been planted, and while it was growing on the lands of the plaintiffs, the said defendants built, erected, and maintained in and across said Bolsa Chica Bay, and across the channel thereof running into the Pacific Ocean, a dam extending above the high tide of the said ocean which was maintained and kept above the high tide up to the month of March, 1900.

“That for more than two years next prior to the building of said dam the land of the plaintiff Thomas had been cultivated and planted with celery, and good celery crops had been grown thereon, and were matured and harvested, and said crops kept in good condition and were fit for market, and were marketed, and sold for from one hundred to one hundred and twenty-five dollars per acre in the field.

“That the ditches constructed for the purpose of draining the land of the plaintiff Thomas had not been used continuously and adversely for the period of five years before the commencement of this action.”

The first and main contention of appellants is that “plaintiffs showed no right to maintain their ditches and to drain water into the Freeman River and the bay through their ditches, and hence cannot complain of the obstruction to the flow of water therein.”

In considering this question, it may be well to notice in the beginning that this is not an action in equity to restrain defendants from maintaining their dam. It is an action to recover only for an actual loss and injury to property suffered by plaintiffs because of this dam. The property injured consisted of a growing and nearly matured crop of celery. The soil upon which this celery was maturing had been cultivated, drained, and made fit for the growth of the crop at a time anterior to the construction of the dam, and the celery had been planted and was rapidly maturing at the time the dam was built. There is nothing to show that plaintiffs were not in every respect acting strictly within their rights at every step they took in the draining and further preparation of this land, as well as in planting and bringing into existence the property destroyed by the subsequent acts of defendants. So far as the drainage ditches are concerned, the map in evidence shows that the river and Bolsa Chica Bay were the natural conduits of the drainage from this land, and that if the land was drained at all it must have been by ditches, either into the river or into the bay direct, or into some other slough or stream connecting with the bay, and of necessity the dam would have affected disastrously any system of drainage that the plaintiffs could have reasonably adopted. The plaintiffs were in possession of a drainage system to the river. No part of this system was upon the lands of defendants, and it connected with a natural water course. From this possession a presumption of title and right of possession arises. It cannot be said that the use of this drainage system invaded any right of the defendants—at least, not up to the time of the construction of the dam.

Now, then, the question is: After this crop of celery had been by plaintiffs' efforts brought into existence, presumably

without invading the rights of any other person, are the defendants entitled by reason of being riparian owners on the river and bay to so use the waters of the same as to destroy property which has been brought into existence as above indicated? There is a principle in law which finds expression in section 3514 of the Civil Code as follows: "One must so use his own rights as not to infringe upon the rights of another." This principle has often been applied so as to restrain a lower riparian owner from damming up the stream in such a manner as to back the water upon the lands of an upper owner on the stream to the injury of the land of the latter and the destruction of his crops growing thereon. The same rule has sometimes been applied to injuries arising on lands not riparian to the stream, but which found a convenient and natural outlet for the drainage of such lands when aided by artificial ditches. (*Krause v. Oregon Iron and Steel Co.*, (Or.) 77 Pac. 833.) This case was recently decided by the supreme court of Oregon. The plaintiff in it was the owner of a tract of twenty-five acres of land near the Tualitin River, which he alleges was drained by it and Rock Creek, a small tributary thereto; and that by reason of the obstruction caused by defendant's dam the water was cast upon his land and the drainage so impeded and retarded as to hinder and delay him in planting his crops until too late in the season for them to mature properly. This land was once of a swampy character, but had been redeemed by drainage, and was very valuable for gardening and farming purposes. The court held that plaintiff was entitled to an injunction restricting the dam to a height that would not result in injury to plaintiff's land. In the opinion it is said: "The defendant owes to the plaintiff and other landowners whose crops are dependent upon the proper drainage of the soil in which they are produced a duty to see that it does not trespass upon their prior-acquired rights and privileges; and it can proceed with its obstruction of the stream just so far only as not to impinge upon these rights and privileges." No question of the statute of limitations is discussed, or even mentioned, but the opinion proceeds upon the theory that the plaintiff having devoted this stream to drainage purposes before the construction of the dam, therefore the dam should be so regulated as not to interfere with such drainage.

If a person can be restricted in the use of his dam in the manner indicated in the above case, it is clear that damages ought to be given plaintiffs herein under the circumstances disclosed by the quoted findings.

We are of opinion that defendants had not the right to back up or retard the waters of the bay and stream to the injury and destruction of the crops of the plaintiffs. The principle governing the case is analogous to that which gives to the owner of land an easement in the lower lands adjoining for the discharge of rain and surface water falling upon his own land. The owner of the lower lands is liable in damages if he dams up and backs and holds the water upon the higher lands. So here the defendants are liable for not permitting the waters to proceed on their way to the ocean, and for interfering with the established drainage system of plaintiffs.

The language of the findings will not admit of any other reasonable construction than that the crop was injured and destroyed by the act of the defendants in damming up and preventing the water from flowing away.

The findings of the court find ample support in the evidence. It would serve no useful purpose to attempt to state or analyze the evidence here. The contract between the plaintiffs was for cropping the land on shares, and each of them owned an interest in the growing crop, and there was no misjoinder of parties plaintiff.

Other objections are urged by appellants, but after a careful examination of them we are of opinion that they are not of sufficient importance to warrant further discussion.

Judgment and order are affirmed.

Smith, J., and Allen, J., concur.

[No. 15. Second Appellate District.—July 21, 1905.]

HIGHLAND PARK OIL COMPANY, Respondent, v.
WESTERN MINERALS COMPANY et al., Appellants.

FORCEFUL ENTRY AND DETAINER—SUFFICIENT PEACEABLE POSSESSION—SUPPORT OF FINDING.—In order to sustain an action for forcible entry and detainer, it is not essential that the prior peaceable possession

of the plaintiff should have existed for any definite length of time. It is sufficient to support a finding of peaceable possession at the date of the forcible entry where there is testimony tending to show the actual peaceable possession of plaintiff for the greater portion of one day prior thereto.

Id.—FORCIBLE EJECTION—SUPPORT OF FINDING—USE OF DEADLY WEAPONS.—A finding that defendants with strong hand and with force and violence ejected plaintiff from the premises is supported by evidence that agents of the defendants demanded possession from plaintiff's agents with the exhibition of deadly weapons, supplemented with a statement that "jumpers have been known to lose a leg," which caused plaintiff's agents to leave the premises.

Id.—EVIDENCE—DEED TO PLAINTIFF—ERROR NOT PREJUDICIAL.—While it is true that in proceedings under the Forcible Entry Act neither title, right of possession, nor good faith on the part of the plaintiff is essential to a maintenance of the action, yet the admission in evidence of a deed to the plaintiff is not prejudicial.

APPEAL from an order of the Superior Court of Kern County denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Laird & Packard, for Appellants.

Reardan & Whitaker, for Respondent.

ALLEN, J.—Action for forcible entry and for forcible detainer. Judgment went for plaintiff. Defendants appeal from an order denying a new trial.

Plaintiff in its complaint alleges that on February 1, 1902, it was in peaceable and actual possession of the south half of the north half of section 28, township 11 north, range 23 west, San Bernardino Base and Meridian, Kern County, California; and was engaged in erecting upon said land a cabin. That on said date the defendants by force and violence entered on said premises, and in a forcible manner ejected plaintiff therefrom, tore down and destroyed the cabin, and carried away the materials used in its construction. As a second cause of action, plaintiff repeated all the matters stated in the first cause of action, and alleged further that defendants still forcibly keep and hold possession of said premises. The answer, in effect, denies all the material allegations of the complaint; and upon the trial the court found the allegations in the complaint to be true.

The principal contention of defendants on this appeal is, that the finding that plaintiff was in the peaceable possession of said premises at the date of the entry has no support in the evidence. There is some testimony tending to show the actual possession of plaintiff for the greater portion of one day. It is not made an essential in the statute that actual possession should have existed for any definite length of time. The mere fact of peaceable and quiet possession is all that is material for plaintiff to establish.

It is insisted further that there is no support in the testimony for the finding of the court that defendants, with strong hand and with force and violence, ejected plaintiff from the premises. There is ample testimony in the record to show that the servants and agents of plaintiff were by force driven off the premises by defendants' agents. Where one man who is armed with and flourishing a deadly weapon approaches another and directs him to vacate premises, supplementing the demand with the statement that "jumpers have been known to lose a leg," and the other, apprehending danger, vacates, there should be no difficulty in determining that such vacation was forcible, and with a strong hand.

It is further contended that the rulings of the court in admitting the deed to plaintiff of the premises was error. While it is true that in proceedings under the Forcible Entry Act neither title, right of possession, nor good faith on the part of plaintiff is essential to a maintenance of the action, yet it is difficult to see the prejudice which would result to the defendants by the proof of all or either of them.

Many other exceptions and objections were made as to the ruling of the court in the introduction of testimony, in none of which are we able to discover any prejudicial error.

The order denying a new trial is affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 41. Third Appellate District.—July 24, 1905.]

HENRY WIELAND, Respondent, v. SOUTHERN PACIFIC
COMPANY, Appellant.

RAILROADS—EJECTION OF PASSENGER FROM FREIGHT-TRAIN—EVIDENCE—CONDITION OF PASSENGER—PAYMENT OF FARE—DECLARATIONS OF CONDUCTOR.—In an action of damages for the ejection of a passenger from a freight-train, where the conductor and numerous witnesses testified that he was drunk, and the plaintiff denied it and attributed resulting injury to his sickness, and it appears that he then paid his fare to the brakeman, it was prejudicial error, without legal foundation for impeachment, to admit evidence of the mere declarations of the conductor made on the subsequent day that the plaintiff was not drunk, that he had paid his fare, and that he had been put off at a prior station because he did not intend to stop at his destination.

ID.—CUSTOM AS TO PASSENGERS ON FREIGHT-TRAINS—RIGHTS OF PASSENGER.—A passenger having knowledge of the custom to carry passengers on freight-trains between certain points has a right to assume its continuance unless notified in the usual manner, and is not bound to make special inquiry or to obtain a special permit; and the railroad company, having knowledge of such custom, would be liable to the passenger for a violation of his rights, though the custom was in violation of its rules.

ID.—SUSPENSION OF RIGHT—NOTICE TO PASSENGERS—CUSTOM AS TO STOPPAGE OF FREIGHT-TRAIN.—The mere fact that passengers were carried on the freight-train did not confer upon plaintiff an absolute right of transportation. The company could suspend or determine the permissive use; and notice to passengers, given at the starting station, or such suspension, or then given under a custom not to stop at plaintiff's station because handling of freight there was not required, if heard by plaintiff, made it his duty to leave the train, and he could be lawfully ejected at an intermediate station if he remained upon the train in violation of such notice.

ID.—PAYMENT OF FARE TO BRAKEMAN—BURDEN OF PROOF—WANT OF AUTHORITY—ERROR IN REFUSING INSTRUCTION.—A brakeman upon a freight-train is not usually authorized to receive payment of fare; and the burden of proof is on the passenger paying fare to him to show that he was authorized to receive it, or that it was paid to the conductor; and in the absence of such proof, and upon proof of the brakeman's want of authority, it was error to refuse an instruction based upon such want of authority.

APPEAL from a judgment of the Superior Court of Fresno County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, for Appellant.

Henry Brickley, and George Cosgrave, for Respondent.

McLAUGHLIN, J.—This is an action for damages caused by wrongfully ejecting plaintiff from one of defendant's trains. The pertinent facts may be summarized as follows: For several months prior to June 18, 1902, passengers had been carried to and fro between Fresno and Rolinda in the caboose of a freight-train. The custom, as shown by the evidence, was for passengers to board the train at either point and pay the fare to the conductor, who always collected such fare from passengers in the caboose. On the date mentioned respondent and other passengers entered the caboose, to be carried to different points along the route, plaintiff's destination being Rolinda. Rolinda is a flag station where this train stops on signal, and it was the custom to let passengers on and off at this point. Kearney's spur is a switch about two and one third miles from Rolinda, at which there are no houses; there are, however, three houses within a distance of one and one quarter miles. The brakeman testified that before leaving Fresno he entered the caboose, and, in a tone loud enough to be heard by any one therein, announced that the train would not stop at Rolinda that night, and that thereupon some men left the caboose. In this he is corroborated by the witnesses who were present, and contradicted by none save respondent, who testified that he heard no such announcement, and saw no person leave the caboose, although he boarded the train quite a while before it left Fresno. The brakeman is not absolutely certain that respondent was present when the announcement was made, but two passengers say that he was and must certainly have heard it. The brakeman, conductor, and passengers who were witnesses agree in saying that respondent was intoxicated when he boarded the train and when he got off. This he denied, and considerable evidence touching his condition before and after his ejection, and relating to his habits in this regard, was introduced by both parties to the action. Respondent paid his fare to the brakeman before reaching Kearney, and at this point was told that he would have to leave the train, as no stop would be

made at Rolinda. He himself says that no force was used; that he got off the train and the brakeman handed him his satchel. He was next seen the following morning lying near the railroad track at a point about one mile from Kearney, and close to a dwelling known as the Saier place. Later in the day he called at this house, obtained something to eat, and made himself obnoxious to Mrs. Saier, who turned the hose on him. That lady and her daughter both say he was intoxicated and drank some while at their house, but respondent again champions his sobriety and says he was not drunk, but was sick. In fact he says he went to Fresno for medicine and was ailing during the whole trip. He admits that he had one bottle of wine with him when he left the train, but other witnesses say that he had four or five bottles in the satchel, which was so heavy that it caused him to stumble and fall when it was handed to him by the brakeman at Kearney.

The conductor first saw the respondent at Kearney, heard his complaints about being put off the train, and offered to carry his satchel to Collis and leave it at Rolinda the following night, which offer was declined.

The evidence shows without conflict that this was the only occasion when the brakeman collected fare from a passenger, and it is also clear that he had no authority to do so then. There is no evidence to show that the brakeman turned the fare over to the conductor or to the company, and the only evidence that the conductor knew that respondent had paid any fare, is found in his declarations as narrated in the testimony of Mr. Kennedy, which narration will be considered later. The brakeman testified that he told the respondent that they would take him to Collis, a station beyond Rolinda, but respondent said he would prefer to get off at Kearney, as it would be a shorter walk from Kearney than from Collis. The respondent, however, says that he asked to be taken to Collis, but his request was refused.

It is apparent from the foregoing that there is a sharp conflict between respondent and other witnesses, and the importance of testimony bearing upon his capacity to realize and remember what transpired, and tending to show that he was less likely to be correct in his statements than other witnesses, is manifest. The theory of plaintiff, as disclosed by the evidence, was that sickness prevented his reaching Rolinda

or any of the dwellings nearest to Kearney, and that as a consequence he was compelled to remain out all night, thereby contracting a cold which, in time, resulted in severe and permanent injury.

On the other hand, the theory of defendant was, that but for his continued drinking from the bottles he had with him respondent could easily have reached Rolinda or at least found shelter in one of the dwellings mentioned.

Under these circumstances, J. W. Kennedy, a witness called by respondent, was, notwithstanding appellant's timely and sufficient objection, permitted to testify to certain declarations of Speake, the conductor, made the next evening at Rolinda, as follows: "I asked Mr. Speake if Mr. Wieland got on the train the evening before. At this time Mr. Wieland had not got home. The next evening when the train came along I flagged the train and asked Mr. Speake if Mr. Wieland got aboard the train at Fresno. He said he did. I asked him what he did with him. He said, 'I put him off at Kearney's spur.' I says, '*Was Wieland drunk?*' He said, '*No.*' I said, 'Didn't he have money enough to pay his fare?' He says, '*Yes, he paid his fare.*' I said, 'What did you put him off for?' He said, 'Because I didn't intend to stop at Rolinda.' " This was error. (*Williams v. Southern Pacific Co.*, 133 Cal. 550, [65 Pac. 1100]; *Heckle v. Southern Pacific Co.*, 123 Cal. 441, [56 Pac. 56]; *Luman v. Golden Ancient Mining Co.*, 140 Cal. 709, [74 Pac. 307].) Counsel for respondent, however, contends that the error is not prejudicial, because the evidence could have little bearing on the case, and in any event was substantially corroborated by the conductor. This contention cannot be sustained. We have seen that the condition of plaintiff, as to being drunk or sober, had an important bearing on the degree of credit to be given his testimony, and also on the cause of his remaining out all night. The conductor testified that he thought plaintiff was under the influence of liquor, and the evidence of Kennedy shows a contrary statement at another time. To hold that such evidence could be harmless would be to ignore its bearing on the testimony of plaintiff and on vital issues in the case and sanction the impeachment of a witness not only in an improper and illegal manner, but at a time antedating the testimony of the witness impeached. Moreover, the declara-

tion as to the payment of fare was important, for aside from this there is nothing in the record to show that the conductor had any knowledge of such payment. The error was, therefore, very prejudicial.

This seems to be the pioneer case in this state touching some questions of law which must necessarily arise on a retrial of the cause, and hence we deem it our duty to pass upon such questions.

The law of this state provides that when fare is taken for transporting passengers on a freight-train the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars. (Civ. Code, sec. 483.) This is the only statute we have touching the relative rights of passengers and company, under such circumstances as are disclosed in the case at bar. Nor can much aid be derived from a study of the few authorities bearing upon cases somewhat analogous. But law is reason, and reason points to principles of law which must control in the solution of questions presented. This particular train, under the regulations of the company, carried passengers whenever the train was to stop at Rolinda. Aside from these regulations, there was strong evidence to show that it always stopped for passengers desiring transportation between the two points. The train did not always stop there, and there was no regular schedule, as stops, according to regulations, depended upon the necessity for handling freight at Rolinda. The custom, according to the conductor, was to lock the caboose when no passengers were to be taken, or to announce the fact before leaving Fresno when no stop was to be made at Rolinda. This being the custom, respondent, who had traveled on this train before, had a right to assume its continuance, and that he would again be given transportation on the same terms as before, unless he was notified in the usual manner and according to the custom mentioned. Therefore he was not bound to make special and independent inquiry, nor to obtain a special permit from the superintendent. There can be no doubt that if the company permitted the inauguration and continuance of this custom, and accepted the fares collected, it would be bound by it, for "He who can and does not forbid that which is done in his behalf is deemed to have bidden it." It could not wink at a violation of its rules as long as benefits

accrued, and then hide behind such rules and regulations when liability was threatened, for, "He who takes the benefit must bear the burden."

But, on the other hand, the mere fact that passengers had been carried on this train did not give respondent an absolute right to transportation. The company could at any time suspend or discontinue this permissive use, and passengers notified either under this undoubted right, or under the custom mentioned, that the train would not stop at Rolinda, were in duty bound to leave the train, and if they did not do so they could lawfully be ejected. (Civ. Code, secs. 484, 487.) The respondent may not have heard the announcement, but if he did he could not here have an advantage growing out of his own wrong in thereafter remaining on the train. It is a matter of common knowledge that brakemen are not authorized to receive fares from passengers on any train, and as a matter of law passengers should not pay fare to any person unless his badge indicates his authority to receive it. (Civ. Code, sec. 488; *Cox v. Los Angeles Terminal Ry. Co.*, 109 Cal. 105, [41 Pac. 794].) Respondent having paid his fare to the brakeman, a person not generally authorized to receive it, the burden was upon him to show authority in this instance. This he utterly failed to do. The evidence affirmatively shows a total absence of such authority, and we think it was error to refuse defendant's instruction bearing on this branch of the case.

We believe the foregoing sufficiently indicates our view touching disputed questions of law.

The judgment is reversed.

Buckles, J., and Chipman, P. J., concurred.

[No. 37. Third Appellate District.—July 25, 1905.]

W. & P. NICHOLLS, Respondent, v. G. W. MAPES, Appellant.

CONVERSION OF CATTLE—AGENCY—TITLE OF PRINCIPAL—ATTACHMENT AND SALE IN HANDS OF AGENT.—In an action for the conversion of cattle by the defendant, where it appears from the evidence that plaintiff employed an agent to buy and sell cattle, whose compensation out of the profits was to be applied to pay the agent's debt to the plaintiff, the plaintiff's title is established, and an attachment of the cattle in the hands of the agent, and a sale thereof to the defendant as the agent's property, for a debt of the agent to the defendant, established a conversion, entitling the plaintiff to recover.

ID.—PURCHASE WITHOUT DISCLOSING PRINCIPAL.—The fact that the agent purchased the cattle in controversy from a third party without disclosing the principal, the purchase having been made out of the funds of the principal, cannot affect the title of the principal against third parties.

ID.—IMPROPER DAMAGES FOR PURSUIT OF PROPERTY—ATTORNEY'S FEES—COST OF DEPOSITIONS.—Attorney's fees are not recoverable in an action for conversion, as damages incurred in the pursuit of the property under section 3336 of the Civil Code, nor as costs in the action. The cost of taking depositions forms no part of the damage, and should be determined in the cost-bill.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Garoutte & Goodwin, for Appellant.

N. J. Barry, for Respondent.

CHIPMAN, P. J.—This is an action to recover the value of certain six head of cows alleged to have been wrongfully converted by defendant on April 26, 1901, at the county of Lassen. The cause was tried by the court without a jury and plaintiff had judgment for the value of the cattle with interest from the date of conversion, and for twenty-five dollars "as compensation for the time and money expended by plaintiff in the pursuit of the property." Defendant appeals from the judgment on bill of exceptions.

The court found as facts: That plaintiff is a copartnership, doing business as bankers in the town of Dutch Flat, Placer County; that on the date above named "plaintiff was the owner of, and entitled to the possession of the six cows described in the complaint"; and said defendant wrongfully converted them to his own use; that plaintiff has expended twenty-five dollars in pursuit of said property.

1. Appellant challenges the sufficiency of the evidence to support the finding that plaintiff was the owner of the property, and thus presents the principal question in the case. It appears that the cattle in question were in the possession of one E. H. Hamlin, and were attached at the suit of the present defendant against said Hamlin, and were purchased at execution sale by said Mapes, who now claims title through such purchase. Plaintiff claims that Hamlin was acting as its agent when he purchased the cattle, and hence its claim of ownership. Hamlin testified: "I was working for W. & P. Nicholls under a written contract." Again he testified: "Whatever purchase I made of those cattle was made in accordance with this contract; supposed to be." We think there is sufficient evidence to show that this contract was in force when the cattle were purchased by Hamlin, and the question of ownership must be determined from an examination of its terms and from such surrounding circumstances as may properly be considered in arriving at the intention of the parties to it. It is dated May 16, 1900, and reads as follows:

"This agreement, made this 16th day of May, nineteen hundred, between W. & P. Nicholls, parties of the first part, and E. H. Hamlin, Jr., party of the second part, is as follows:

"Whereas, the parties of the first part have advanced to the party of the second part, divers sums of money from time to time to purchase cattle and pay the expenses of keeping the same, and for other purposes, and thereby the party of the second part has become indebted to the parties of the first part, and by a statement this day made, the party of the second part should have on hand 186 head of cattle;

"Now, for the purpose of paying said indebtedness, the party of the second part does hereby assign, sell, and transfer to the parties of the first part all accounts and demands of every kind which may be due him at this date, and also all

live stock which he may now own, or may have the right to the possession of, or may have pledged for debt, or may have contracted to buy.

"The party of the second part hereby agrees and promises to deliver to the parties of the first part, 186 head of cattle on or before January 1, 1901, and the same when delivered, shall be the property of the parties of the first part, and the proceeds arising from the sale of the same shall be paid to the parties of the first part and credited to the accounts of the party of the second part, and applied upon the said indebtedness.

"And the parties of the first part shall have the right to collect all book accounts now due the said party of the second part, and the same when collected, shall be applied upon said indebtedness.

"And for the purpose of paying said indebtedness, the party of the second part agrees to devote his undivided time, skill and labor to the buying and selling of cattle, and for that purpose, the parties of the first part will advance to him from time to time, such sums as may seem to them reasonable for the purpose of buying stock and paying expenses connected with the keeping and selling of the same.

"The parties of the first part hereby employ the party of the second part to act as their agent and employee, and not otherwise, in the buying and selling of cattle, and agree to pay to him for said services, the sum of fifty dollars (\$50) per month, and his reasonable personal expenses; such employment to be continued for such length of time as may be agreeable to the parties of the first part.

"A statement shall be kept of all accounts from this date, and for that purpose, a new account shall be opened between the parties hereto, and the amount of indebtedness existing at this date shall be charged on said account to the second party, and the amount realized from the sale of said 186 head of stock, and the collection of book accounts now due him, shall be charged against the same, and if there shall remain a balance due the said parties of the first part, all the profits arising from the conduct of said business from this time forward, shall be applied upon the payment of the amount due, and interest thereon at nine per cent per annum, payable semi-annually, and if not so paid, to be added to the principal, and

bear a like rate of interest, until the same is fully paid, and when the same is fully paid, this contract shall cease.

"All stock shall be purchased and sold in the name of the parties of the first part, and the expenses of caring for, purchasing, driving, transporting and selling of said stock, and the personal expenses of said second party, and his said wages of fifty dollars (\$50) per month, and interest at the rate of nine per cent per annum, payable June 30th and December 31st of each year; and if not so paid, to be added to the principal and bear a like rate of interest, on all advances, shall be first deducted from the proceeds of sales, and the balance, if any, shall be applied upon the said indebtedness.

"E. H. HAMLIN, JR.

"W. & P. NICHOLLS."

It appears that Hamlin had been engaged in the business of buying cattle in Lassen County, and became indebted to plaintiff for advances of money. Hamlin had some cattle, and the contract recites that he "should have on hand 136 head." It was "for the purpose of paying" his "indebtedness" to plaintiff that the contract was entered into. Hamlin transferred to plaintiff all his interest in the cattle he then (May 16, 1900) owned and all accounts due him at that time, and undertook to deliver these one hundred and eighty-six head of cattle to plaintiff on or before January 1, 1901, to be plaintiff's property when delivered, but the proceeds of their sale and of the book accounts were to be applied to Hamlin's indebtedness existing at that time. It may be inferred from the contract as well as from the testimony that these cattle and the book accounts were not deemed sufficient to pay the indebtedness of Hamlin to plaintiff, and it was therefore further agreed that Hamlin should continue the purchase of cattle, devoting his time exclusively to that business, and "for that purpose the parties of the first part will advance to him from time to time such sums as may to them seem reasonable for the purpose of buying stock . . . and selling of the same." And to fix the relation the parties were to sustain to each other in this future business, the contract next provides: "The parties of the first part hereby employ the party of the second part to act as their agent and employee, and not otherwise, in the buying and selling of cattle, and agree to pay him for his services, the sum of fifty dollars

per month, and his reasonable personal expenses," the "employment to be continued" as long as "agreeable to the parties," except that it was provided that upon plaintiff being fully paid "this contract shall cease." It was further expressly provided that "all stock shall be purchased and sold in the name of the parties of the first part," and "the expenses of caring for, transporting and selling of said stock, and the personal expenses of second party, and his said wages of fifty dollars per month, and interest . . . shall be first deducted from the proceeds of sales, and the balance, if any, shall be applied upon the said indebtedness." The evidence was that the six head of cattle were purchased by Hamlin, and constituted no part of the one hundred and eighty-six head; that he paid for them by check upon plaintiff; that at that time he was still indebted to plaintiff. Both of the members of the plaintiff copartnership testified that they paid for and were the owners of the six head of cattle in dispute, and that Hamlin was in its employment on wages. Hamlin testified that when he purchased these six head of cattle he said nothing to the vendor as to whom they were purchased for; that he sometimes bought cattle and sold them to butchers, stating that they belonged to plaintiff, and that he collected the money for plaintiff; at other times he sold to other butchers and collected the money without informing them who owned the cattle, and all this money was used in the business; that at times he used some of his own money for expenses which he charged to plaintiff, and that plaintiff's books show the number of cattle purchased by him under this employment.

Defendant urges several considerations as showing that the court should have found from the evidence that the cattle belong to him. It is said that they were attached in Hamlin's possession, which constituted *prima facie* evidence of title; that plaintiff failed to explain this possession because, as is claimed, plaintiff failed to show that the contract above referred to was in force when the cattle were purchased. It is true that the cattle in question were not purchased until after January 1, 1901, by which time Hamlin had agreed to turn over the one hundred and eighty-six head. But it appeared that the business was continued after that date. Whether or not these one hundred and eighty-six head were delivered to plaintiff does not appear, but it does appear that Hamlin was

still in plaintiff's debt and his checks were being honored under his employment. Hamlin's possession was explained by the contract and by the testimony. But conceding this, appellant contends that it is not possible "to get out of the contract a construction which makes plaintiff the owner of the cattle." Considering the circumstances which to appellant's mind make this construction seem impossible, we see no particular significance in the fact that Hamlin did not explain to his vendor of the six head of cattle that he was buying them for plaintiff. If the vendor were the attaching creditor he might urge the circumstances attending the sale as showing that Hamlin was the owner without looking to Hamlin's principal, which latter he might also do. (Civ. Code, sec. 2336.) But the vendor was paid by check on plaintiff, and Hamlin was not called upon to make any explanations, and plaintiff's rights cannot suffer because Hamlin did not disclose his principal. Nor do we see that the fact that plaintiff is to have interest for the use of its money, and Hamlin to have all the profits applied to paying his indebtedness to plaintiff, is inconsistent with the idea of plaintiff's ownership of the cattle. There were no profits in excess of the indebtedness, and we need not concern ourselves with the question of their disposition had there been any such, for the contract provided that as soon as the indebtedness was paid the contract was to terminate.

It is contended that the contract was one for plaintiff's security, and that the cattle could not become a security until delivered to plaintiff. This may be true of the one hundred and eighty-six head, for the contract provided that as to them they were to belong to plaintiff when delivered, their proceeds when sold to be applied to Hamlin's indebtedness. But as to the purchase of cattle in the future it was expressly provided that Hamlin should act as plaintiff's agent, should use plaintiff's money in making purchases for plaintiff, and if there were any profits above the money so laid out and interest thereon it was to be applied to Hamlin's indebtedness existing at the time the contract was made, and not to any new indebtedness, for none was to be created; and Hamlin's only obligations were such as arose out of the relation of principal and agent. It seems to us that the transaction was the not unusual arrangement by which the principal employs an agent to purchase and sell goods for him, the agent to be compen-

sated out of the profits. In the present case the compensation or profits, if any, were to be applied to pay the agent's debt to the principal. It is quite true that the actual relation of the parties to each other must be judged from a fair construction of the entire contract and all the circumstances, and that the court is not bound to assume that there was the relation of principal and agent from the mere fact that the parties so described themselves. (*Stockton Sav. and L. Soc. v. Purvis*, 112 Cal. 236, [53 Am. St. Rep. 210, 44 Pac. 561].) Looking to all the provisions of the contract and the attending circumstances, we think it clear that the cattle in question were purchased by Hamlin as the agent of plaintiff, and that plaintiff was the owner at the time they were attached and sold to defendant. It does not appear upon what indebtedness the cattle were attached nor under what circumstances nor when the indebtedness accrued. There is no evidence that defendant was in any way deceived by Hamlin in contracting the indebtedness for which the cattle were attached, nor that it had any connection with Hamlin's actual or ostensible relation with plaintiff, either in the purchase of cattle or otherwise; nor was there any concealment of the relation sustained by Hamlin and plaintiff, for the contract was duly recorded in the county where Hamlin bought the cattle, and on occasions he stated that he was buying for plaintiff, and it does not appear that he ever purposely concealed the fact of his agency. An agent is one who represents another, called the principal, in dealing with third persons (Civ. Code, sec. 2295), and may be authorized to do any acts which his principal might do. (Civ. Code, sec. 2304.) In *Loomis v. Barker*, 69 Ill. 360, the proof was, that certain horses belonged to appellee, and that at the time they were levied upon they were in the possession of one Cook as the general agent of appellee, who was authorized to sell them for appellee and was required to account to him for the proceeds of sale. The court said: "This did not invest Cook with any title to the horses so as to render them liable to be seized on execution or attached against him and sold for the payment of his debts." The case of *Stockton Sav. and L. Soc. v. Purvis*, 112 Cal. 236, [53 Am. St. Rep. 210, 44 Pac. 561], relied on by appellant, is not, in its facts, sufficiently similar to the present case to make the principles there enunciated applicable. In that case the

plaintiff was the owner of land, and made a secret oral agreement with his tenant that the tenant should pay a cash rental for the land, and that the title to the crops grown on the land should remain in plaintiff and when harvested should be delivered to the nearest warehouse and stored in the name of plaintiff, and from the sale of the crops plaintiff should receive as rent the sum stipulated, and the overplus, if any, should go to the tenant. The growing crop was attached by the creditor of the tenant and the action was against the sheriff by plaintiff. The court held that in effect the contract was "an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject." In the case here the purpose was not to secure the money advanced to purchase cattle; it was to make an arrangement or investment whereby Hamlin could pay a debt he owed plaintiff; it was to furnish means whereby the result of his labor alone would discharge this debt; if he so managed by his skill and labor, in the use of plaintiff's money, as to yield a profit in the business this profit should be his reward, and when it was sufficient to pay his debt the agency was to cease. But in the cattle he was to purchase he had no interest whatever. The case seems to us quite different from the case above cited.

2. It is further contended that the findings and judgment for twenty-five dollars as compensation for the pursuit of the property are unsupported by the evidence. The only testimony on the point was that of John Nicholls (one of the members of plaintiff), who testified that plaintiff paid at different times "consultation fees" to its attorney at Auburn twenty-five dollars; that he "made three trips to Auburn in the matter for which a legitimate proportion" of his "expense there is \$5.00"; that he paid ten dollars "in expenses of Charles Tuttle in coming to Dutch Flat to take the depositions"; that he paid "about \$5.00 notary's fees, making in all the sum of fifty dollars." Attorney's fees are not recoverable as damages under section 3336 of the Civil Code, nor as costs in the action. (*Hays v. Winsor*, 130 Cal. 230, [62 Pac. 395].) Aside from payments for attorney's fees the evidence does not show for what purpose the witness made a trip to Auburn, though probably to consult his attorney; nor does it appear for what he paid the notary; it may have been for taking the depomi-

tions. The payment to Charles Tuttle is not sufficiently explained to enable us to judge in what capacity he served in taking the depositions. The expenditure for depositions, however, should be determined in the cost-bill, and forms no part of the damages as such.

The judgment is modified by striking out the item of twenty-five dollars as compensation for the pursuit of the property, and otherwise the judgment is affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 27. Third Appellate District.—July 25, 1905.]

H. W. OGLE, and C. F. HUBBEL, Appellants, v. JOHN HUBBEL, Respondent.

UNLAWFUL DETAINER—LEASE WITH PRIVILEGE OF PURCHASE—EQUITABLE DEFENSE—FRAUDULENT CONVEYANCE BY LESSOR.—A lease making the lessee a preferred purchaser in case of sale contemplates a *bona fide* sale, and not a fraudulent one; and in an action for unlawful detainer brought by grantees of the lessor the defendant may set up as an equitable defense that the sale to such grantees was collusive and fraudulent for a fictitious price, with the intent to deprive the defendant of his rights under the lease and to oust him from the premises, after the lessor had refused his request to place a cash price thereupon so that he could purchase the same, which he was able and willing to do.

1D.—RIGHT TO AFFIRMATIVE RELIEF NOT ESSENTIAL.—It is not essential to the equitable defense that the defendant should show any right to affirmative relief, or that the contract in the lease should be an enforceable contract for the sale of land.

1D.—ATTORNTMENT TO FRAUDULENT GRANTEES NOT REQUIRED—REFUSAL TO PAY RENT—FINDINGS.—The lessee having been deprived by a pretended sale of the important privilege to purchase the land, which the lease gave him, he could not attorn to the fraudulent grantees without recognizing the validity of their purchase and their right to terminate the lease and deprive him of the balance of his term; and where the court found upon sufficient evidence that the deed was made for the fraudulent purpose shown, it was not necessary to find that defendant has refused to pay the rent to the plaintiffs.

1D.—EVIDENCE—ABILITY AND WILLINGNESS TO PURCHASE—OFFER TO PAY RENT TO LESSOR—FINANCIAL CONDITION OF GRANTEES.—Under the issues it was competent for defendant to show ability and willing-

ness to purchase the property at its fair market value. Evidence that he offered to pay the rent to the lessor, who is not a party, and that the lessor refused to accept it was not prejudicial. It was permissible to prove the financial condition of one of the grantees as bearing upon the issues, and to contradict his testimony.

APPEAL from a judgment of the Superior Court of Stanislaus County and from an order denying a new trial. William O. Minor, Judge.

The facts are stated in the opinion of the court.

Nicol & Orr, and Dennett & Walthall, for Appellants.

P. H. Griffin, for Respondent.

CHIPMAN, P. J.—Unlawful detainer. One Barbara Hubbel, mother of C. F. Hubbel, was the owner of the demised premises, and on October 18, 1899, leased the same to the defendant. The lease was for five years, with right of renewal for five years, the term to commence on the day of its execution; the rental being twenty-five dollars per month, payable monthly in advance on the first day of each month. It was further provided that the lessor "may sell said premises during the continuance of this lease either subject to the terms hereof or that such sale may terminate and determine this lease within one year after notice of said sale, but it is understood that said party of the second part [lessee] may always have the preference as purchaser in case of sale."

Defendant entered under the lease and paid rent agreeably thereto until and including the month of April, 1902. On April 29, 1902, Barbara Hubbel executed a conveyance of the premises to plaintiffs by bargain and sale deed, which was duly recorded April 30, 1902, and on that day they served written notice on defendant that they had purchased the premises, and that they "wish to obtain possession of said premises as soon as they can be vacated by you." On May 22, 1902, plaintiffs served upon defendant written notice requiring him to pay rent to them, being twenty-five dollars for the month of May, 1902, "or deliver to us the possession of all of said premises in three days from the time of service upon you of this notice." Defendant failing to pay rent, plaintiffs filed their verified complaint June 13, 1902, alleg-

ing, among other things, that they had purchased the property and were now the owners thereof. Defendant answered, admitting the execution of the lease and his possession under it; he also admitted the execution of an instrument by said Barbara Hubbel purporting to convey said premises, but alleged "that said purported deed was made to defraud defendant of his legal rights under and by virtue of said written lease, . . . and denies that the plaintiffs are the owners of the lots described in the complaint"; denies that he has refused or neglected to pay the rent required by said lease, and alleges that he has offered to pay the rent to his lessor, Barbara Hubbel, and to plaintiffs, but that plaintiffs have refused such payment, and also alleges willingness and ability "to pay said rent to the persons whom the court may determine to be the proper persons to receive said rent, and here with the filing of this answer deposits the money in court."

By way of an equitable defense to said action and as a cross-complaint defendant alleges the execution of the lease and his performance of all the conditions thereof on his part to be performed; that his lessor, "in order to oust defendant from said premises, fraudulently, and without consideration, transferred said property to . . . plaintiffs herein, on or about the 29th day of April, 1902"; that plaintiffs took said deed with full knowledge of defendant's rights under said lease and his right to purchase said property, and well knew that said deed was made "to oust defendant from said premises"; that defendant "has always been able, willing, and anxious to buy said property from said Barbara Hubbel . . . That she has refused to place a cash price upon said premises so that defendant could purchase the same and she still refuses and neglects to do the same."

There was no demurrer to the answer or cross-complaint, and the trial proceeded, the court sitting as a jury.

The court found that the lease was executed as above stated; that defendant entered into possession and has ever since been in possession under it; that he has never refused to pay rent to said Barbara Hubbel; that she refused to accept rent after April 29, 1902; and that ever since that time defendant has been able, ready, and willing to pay said rent to said Barbara Hubbel, "and has proffered the same to her, but she has refused to accept the same or any part thereof"; that on April

29, 1902, she, "by an instrument in writing, conveyed said premises to plaintiffs herein"; that prior thereto she had notified defendant "that she intended to sell the same and the terms of such sale," but refused to place a cash value upon the property upon defendant's request, and so notified him. "That said Barbara Hubbel, for the purpose of ousting defendant from said premises and to avoid the terms of said lease, conveyed said premises to plaintiffs; that plaintiffs at the time of said sale were in collusion with said Barbara Hubbel to defraud defendant of all rights under said lease and to oust defendant from said premises, and to terminate said lease"; that defendant has performed all the conditions of said lease by him to be performed, and he always has been willing and able to buy said property, but said Barbara Hubbel refused to place a price upon the same; and that when plaintiffs received said deed "they had actual notice of defendant's equity and interest in the land"; that plaintiffs have not been damaged.

As conclusions of law the court found that plaintiffs are not the owners of the demised premises; that they are not entitled to rents; that defendant is rightfully in possession; that he has not broken the terms of the lease; and that neither of plaintiffs has any right, title, or interest in the premises.

Judgment passed against plaintiffs, and each of them, "that all adverse claims of the plaintiffs and each of them to said premises or any part thereof are invalid and groundless; that defendant be and he is hereby declared and adjudged to be entitled to the lawful and peaceful possession of said premises and every part thereof." From this judgment and the order denying plaintiffs' motion for a new trial they appeal.

Plaintiffs claim that their title was not an issue and could not be tried in this form of action and that the evidence is insufficient to justify the decision, for the reason that there is no evidence that defendant either paid or offered to pay any rent to plaintiffs after April 29, 1902, the date of their alleged purchase of the premises. Defendant does not deny that he paid no rent to plaintiffs; he not only refused to attorn to plaintiffs, but denied their right to demand or receive rent, and denied their alleged ownership of the premises demised. His contention was and is, that the conveyance to plaintiffs by his lessor was fictitious and fraudulent, and there-

fore void, and was made for the express purpose of depriving him of his lease and of his right to purchase the property. The court found for the defendant upon these issues, and if defendant had the right in this action to make this defense, and did in fact support it by sufficient evidence, it was not essential to defendant's recovery that he should show an offer to pay or a payment of rent to plaintiffs. The correctness of the decision rests mainly upon the right solution of the question thus raised. We think that the decisions of the supreme court of this state show that the rule contended for by appellants is not applicable where fraud is shown to have entered into the procurement of the lease, but that under such circumstances the tenant may dispute the title of his landlord.

In *Mason v. Wolf*, 40 Cal. 246, it was said that "the consequences of entering into the contract can only be avoided by showing some fraud or mistake which would have been sufficient to set aside the lease itself." In *Johnson v. Chely*, 43 Cal. 299, the action was unlawful detainer under the act of 1862 (Stats. 1862, p. 652) to recover premises from a tenant holding over after demand of rent due, and failure to pay for the space of three days. Defendant, among other defenses, alleged that the lease sued upon was procured through fraud. The trial court refused to permit defendant to prove that he was already in possession of the premises when he agreed to become the tenant of the plaintiffs, and that they induced him to assume the relation of tenant to them by their fraudulent misrepresentations that they were the owners of the premises. After showing that in ejectment the defendant is permitted to show fraud, and is not estopped to dispute his landlord's title where he did not enter under the lease, and that the landlord cannot throw him out by mere force of such a lease, the court said: "That the same result must follow so far as the defendant is concerned in an action of unlawful detainer in which a lease relied upon to establish the relation of landlord and tenant is shown to have been obtained under such circumstances as would not have estopped the tenant from disputing the title of the landlord in a court in which the title could be tried."

In *Knowles v. Murphy*, 107 Cal. 107, [40 Pac. 111], one of the issues presented by the defendants was, that they were

induced to enter into the lease by reason of certain false and fraudulent representations. This defense seems to have been recognized as properly made, and failed only because of insufficient evidence to support it. In the case of *Davis v. Schweikert*, 130 Cal. 143, [62 Pac. 411], the lease provided that the lessee would surrender possession "in case the said party of the first part should sell the property herein described at any time during the term of the lease." The tenant's lessor made a conveyance of the premises to defendant, who represented to plaintiff (the tenant) that she had purchased and paid for the property, and, relying on the truthfulness of these representations, plaintiff surrendered possession. He afterwards learned that the sale was fictitious and fraudulent and made for the purpose of regaining possession from him. He brought the action for damages and recovered. The court, in affirming the judgment, said: "The lease conveyed to plaintiff the premises for the term of five years, subject to the condition expressly written in the lease that it should terminate upon the property being sold by the lessor. The covenant must be understood as meaning an actual *bona fide* sale and not a fraudulent one. It was not contemplated—or, at least, the law does not contemplate—that the lessor could by a pretended fraudulent sale, made for the very purpose of defeating his lessee of his estate, avoid the lease and then take advantage of his own wrong."

We cannot doubt that had the action been unlawful detainer to dispossess the tenant under pretense of sale he could have successfully defeated it by showing the sale to have been fraudulent and for the purpose of ousting him.

In the case of *Simon Newman Co. v. Lassing*, 141 Cal. 174, [74 Pac. 761], the action was unlawful detainer. Defendant conveyed the property to plaintiffs and subsequently gave plaintiffs a note for \$936, in consideration of which plaintiff agreed that defendant might remain in possession one year. To plaintiff's complaint defendant answered that the deed was executed and the agreement for possession was made through the false and fraudulent representations of plaintiff. At the trial defendant had the verdict, and the trial court, on plaintiff's motion, granted a new trial. In the course of the opinion on appeal, the court said: "Respondent contends, as we understand the brief of counsel, that defendant is estopped

to deny his landlord's title, under the general rule that a lessee cannot, in an action involving possession or right of possession, question the title of his landlord; that defendant must first go into the equity court and have the deed set aside if made through fraud or undue influence. While desiring to avoid the discussion of questions that may not hereafter arise, it is proper, perhaps, to say that, in our opinion, the defendant may show, as part of the transaction leading up to the lease, and as evidence bearing upon the question of fraud and undue influence in the execution of the lease, that the deed as well as the lease was so executed, and to show the relation of each to the other as one transaction. Defendant is not seeking rescission, nor is he asking to have the deed set aside as void; he is simply defending against plaintiff's action on the ground of fraud and undue influence, and asks no affirmative relief. We think he may do this without rescinding (Citing cases.) The answer is intended to set forth what in *Toby v. Oregon R. R. Co.*, 98 Cal. 490, [33 Pac. 550], is termed 'defensive relief, whereby fraud is set up by way of defense to defeat an action brought to enforce an apparent liability.' "

In the case now here, the lease was not originally procured by fraud, but the effect of the findings is, that plaintiffs now hold it in defraud of defendant's rights, through the acts of defendant's lessor and her grantees, and that they are seeking to enforce it to his detriment.

So far as plaintiffs are concerned, the lease in their hands is found to be tainted with fraud, because the deed, by force of which alone the plaintiffs claim under the lease, was fraudulent and void. That evidence was admissible to establish the facts found we entertain no doubt, in view of the principles enunciated in the foregoing cases. The remaining question then is, Was the evidence sufficient to justify the findings?

Mrs. Hubbel, on February 14, 1902, wrote defendant informing him that she had an opportunity to sell the premises for nineteen hundred dollars cash and forty-five hundred dollars payable in four years, with interest at eight per cent, compounded yearly, and secured by mortgage on the land, and unless she received from him the above or a better offer before March 1, 1902, she would accept the offer above mentioned and sell the property upon the said terms. On Febru-

ary 26, 1902, defendant replied: "I have reason to know that said pretended sale is for the sole purpose of ousting me from said property." He stated further: "If you intend to make a *bona fide* sale of the leased premises, kindly state the amount you will take in cash upon the delivery of the deed to me"; and he also added: "By the terms and agreements and covenants of your lease to me, a cash and real value must be placed upon the premises and *bona fide* purchaser." To this letter Mrs. Hubbel replied March 3, 1902, informing defendant that he was not entitled to any better or different terms than those upon which she could dispose of the property to other parties, and added: "Of course I understand from your letter that you are not desiring to purchase the property in good faith, and so it will receive no further attention from me and I will proceed to complete the sale already agreed upon."

Without further notice to defendant, she executed the deed to plaintiffs above mentioned. Plaintiff Ogle testified that for his half-interest he paid one thousand dollars in cash and delivered his note secured by mortgage on the premises for \$2,250, payable four years after date, at eight per cent interest. Plaintiff Hubbel testified that he gave his note to Mrs. Hubbel for \$2,250, payable one year after date, at eight per cent interest, without security. He testified that at various times in previous years he had deposited with his mother four hundred dollars, which she allowed as a payment on the purchase, and that she made him a present of five hundred dollars, and that he had paid about one hundred dollars on the note since the transaction. These items aggregate sixty-five hundred dollars. The undisputed evidence was, that the market value of the premises was not to exceed three thousand dollars, some witnesses placing it at twenty-five hundred dollars; that defendant was able and willing to purchase the property at its reasonable or market value; that plaintiff Hubbel was without means, and that his expectations to meet his note were that he would earn the money or obtain renewal of the note. Mrs. Hubbel did not testify, and the court had only the testimony of plaintiff Hubbel as to what he paid for his interest in the property. Some facts were brought out from which the court was no doubt led to discredit the testimony of plaintiff Hubbel, and which tended to show that the sale, if meant to be binding at all, was for about half the

amount Mrs. Hubbel informed defendant she was offered for it. The trial court had the witnesses before it, and with its discretion in accepting or rejecting the statements of witnesses under the circumstances disclosed we cannot interfere. There was sufficient evidence to support the findings of the court as to the fictitious character of the transaction.

The contention of appellants that Mrs. Hubbel had the right to give away a half-interest in the property to her son, if she wished to do so, is not consistent with respondent's rights under the lease. The lease contemplated a *bona fide* sale before defendant could be deprived of his rights under the lease. It may be that the lessor had the right to make a sale to some one willing to give more than the market value, and that defendant would be obliged to pay this sum if he wished to purchase, but in any event the sale would have to be "an actual *bona fide* sale and not a fraudulent one." (*Davis v. Schweigert*, 130 Cal. 143, [62 Pac. 411].) It may also be that the lessor had the right to convey the property by gift to her son, but such a conveyance would not have terminated the lease or have affected defendant's rights under it; he would still have the right of purchase in case of a sale during the life of the lease.

But the court found that the conveyance here was a fraudulent one, and in effect found that the consideration to be paid by plaintiff Hubbel was pretended and fictitious, and was designed to so increase the price to defendant that he would not buy, while Mrs. Hubbel was at the same time receiving all the property was worth in the market. The undisputed fact, on plaintiff's own showing, was that she did not dispose of the property upon the terms she wrote defendant she was offered for it.

Plaintiffs contend that defendant's rights were not prejudiced by the conveyance, because he had the same remedies against them, as grantees, as he had against his lessor. This might be true had defendant declined to purchase after notice of a *bona fide* offer of purchase by some other person. But he was deprived by this pretended sale of the important privilege to purchase which the lease gave him. He could not attorn to plaintiffs without recognizing the validity of their purchase and their right to terminate the lease and deprive him of the balance of his term.

Appellants further contend that the provisions of the lease were not such as to constitute a valid or enforceable contract for the sale of the leased land, because they were indefinite, uncertain, and incomplete. Under the terms of the lease, defendant could not compel his lessor to sell to him at any price.

But this is not an action to specifically enforce the contract; defendant does not seek affirmative relief; he seeks merely to prevent the perpetration of a fraud upon his rights. (*Simon Newman Co. v. Lassing*, 141 Cal. 174, [74 Pac. 761].)

If, as was found by the court, the deed was made for the fraudulent purpose shown, the court was justified in finding that plaintiffs were not damaged. It was not necessary for the court to find that defendant refused to pay rent to plaintiffs, in view of its findings as to the fraudulent nature of the transaction. Nor do we think the findings contradictory, in that the court found that the property was conveyed to plaintiffs by Mrs. Hubbel, and elsewhere that plaintiffs had no title. The findings plainly show that the court did not regard the conveyance as valid, though in fact executed.

Under the issues, it was competent for defendant to show ability and willingness to purchase the property at its fair market value. He was not bound to pay her a sum fictitiously or fraudulently named to him as offered by another person. It was not prejudicial error for defendant to show that he had offered to pay rent to his lessor and that she had refused to accept it. Under the circumstances of the case, and his lessor not being a party, it was perhaps unnecessary for him to show an offer to pay his lessor. If plaintiffs had shown themselves to have been *bona fide* owners of the property, an offer to pay rent to their grantor would have been no defense. This, however, was not the case, and the evidence was harmless. It was not error to allow proof of plaintiff Hubbel's financial condition as bearing upon the issues presented and as tending to contradict his testimony.

The judgment and order are affirmed.

McLaughlin, J., and Buckles, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 22, 1905, and a petition to

have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 23, 1905.

[No. 36. Third Appellate District.—July 25, 1905.]

A. B. BUTLER, Appellant, v. RICHARD DELAFIELD et al., Copartners, etc., Respondents.

ACTION FOR BREACH OF CONTRACT—VERIFIED PLEADINGS—INCONSISTENT DEFENSES.—In an action for breach of contract, although the pleadings are verified, it is permissible for the defendant in his answer to deny the making of the contract alleged, and in separate defenses to admit its execution.

ID.—COMPLAINT AGAINST FIRM—USE OF WORD "DEFENDANTS"—DESCRIPTION IN ANSWER NOT AMBIGUOUS.—Where the complaint is against copartners doing business under a firm name and alleges that defendants were such copartners, and thereafter refers to them as "defendants," an answer describing them as "defendants" is not ambiguous, but must be understood to refer to their alleged relation to each other as copartners.

ID.—DEMURRER FOR AMBIGUITY AND UNCERTAINTY—REVIEW UPON APPEAL.—The improper overruling of a demurrer for ambiguity and uncertainty will not work a reversal of the judgment where it appears that the matters complained of by it have not affected any substantial right of the demurrant. An appealing plaintiff is not prejudiced by the overruling of such a demurrer to uncertain denials in the answer, where he could not be misled by the denials and offered no evidence to support his complaint or to controvert evidence in support of separate defenses in the answer as to which there was no ambiguity.

ID.—SUFFICIENCY OF FINDINGS—FORMER JUDGMENT—PLEA IN BAR—COUNTERCLAIM—SUPPORT OF JUDGMENT.—Where plaintiff offered no proof of the allegations of his complaint, it was the duty of the court to find against him; and it was not necessary to find upon the plea of a former judgment in bar of the action. Findings in favor of the same judgment pleaded as a counterclaim are sufficient to support a judgment rendered for the amount thereof against the plaintiff.

ID.—JUDGMENT UPON PARTNERSHIP CLAIM—SUPPORT OF FINDING.—A former judgment rendered in an action in another state at suit of all the defendants jointly against the plaintiff, in which the cause of action sued upon here was adjudicated, and a judgment

rendered for the defendants upon what is shown to be a partnership cause of action, is sufficient to support a finding that the judgment was in favor of the firm.

Id.—NON-PAYMENT OF JUDGMENT—PRESUMPTION—BURDEN OF PROOF—HARMLESS ERROR IN EVIDENCE.—The non-payment of the judgment pleaded as a counterclaim is presumed, and the burden of proof of payment was upon the plaintiff. The deposition of a defendant containing inadmissible evidence of non-payment was harmless, where there was no evidence of payment.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Stanton L. Carter, for Appellant.

The findings are conflicting and uncertain and do not support the judgment. (*Kerns v. McKean*, 65 Cal. 411, 4 Pac. 404; *Randall v. Hunter*, 66 Cal. 512, 6 Pac. 331; *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113; *Carman v. Ross*, 64 Cal. 249, 29 Pac. 510; *Reese v. Corcoran*, 52 Cal. 495; *Dorsey v. Newcomer*, 121 Cal. 213, 53 Pac. 557; *Krug v. Luz etc. Brewing Co.*, 129 Cal. 322, 61 Pac. 1125.) The onus of proving non-payment is upon the party alleging it. (*Frisch v. Caler*, 21 Cal. 71; *Davanay v. Eggenhoff*, 43 Cal. 395; *Wetmore v. San Francisco*, 44 Cal. 300; *Farmers' etc. Bank v. Christensen*, 51 Cal. 572.)

Carter P. Pomeroy, and M. K. Harris, for Respondents.

It is the duty of the court to construe the findings to avoid inconsistency. (*Murray v. Tulare I. Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; *Spaulding v. Dow*, 118 Cal. 424, 50 Pac. 543; *Loustalot v. Calkins*, 120 Cal. 688, 53 Pac. 258; *Scribner v. Hanke*, 116 Cal. 613, 48 Pac. 714; *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053.) The judgment being supported by the findings, and there being a failure of proof of the cause of action, the failure to find upon the plea in bar is not ground for reversal, and plaintiff cannot complain thereof. (*Adams v. Helbing*, 107 Cal. 298, 40 Pac. 422; *Hiken Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Giletti v.*

Saracco, 110 Cal. 428, 42 Pac. 918; *Estate of Connors*, 110 Cal. 408, 42 Pac. 906; *Costa v. Silva*, 127 Cal. 354, 59 Pac. 695; *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167; *Woodham v. Cline*, 130 Cal. 497, 62 Pac. 822.) The burden of proof to establish payment of the judgment pleaded in the cause was upon the plaintiff. (1 Jones on Evidence, secs. 52, 53, 176; *Melons v. Ruffino*, 129 Cal. 514, 29 Am. St. Rep. 127, 62 Pac. 93; *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142.)

CHIPMAN, P. J.—Appeal from a judgment of the superior court of Fresno County in favor of defendants and from an order denying plaintiff's motion for a new trial. The complaint demands damages for the breach of a contract to take thirty carloads of dried prunes and advance thereon seventy-five per cent of their market value, and to sell the same for a commission of two and one half per cent, and account for the proceeds received from the sale of the prunes, less advances, expenses, and commissions. It is alleged that plaintiff shipped the thirty carloads of dried prunes to defendants, and that defendants received and made the agreed advances on fifteen carloads, but refused to receive or sell or make advances on the remaining fifteen carloads, but left them uncared for, whereby they deteriorated in value, and plaintiff was compelled to employ other persons to sell the same, to his damage in the sum of fifty-five hundred dollars.

In their supplemental and amended answer defendants deny making any agreement "that they would take and receive, or take or receive, thirty carloads of dried prunes on commission, or advance to the plaintiff seventy-five per cent of the market value thereof, or care for or sell said prunes at the best or any market prices obtainable therefor, . . . less any actual expenses, . . . and the advances made to plaintiff on account thereof, and a commission of two and one half (2½) per cent of the amount received therefor, and denies that said two and one half per cent was to be retained by said defendants as full or any compensation for the services of said defendants in caring for and selling said prunes"; deny that plaintiff shipped to defendants "the thirty carloads of dried prunes in accordance with the contract set forth in said complaint," and that "as to the other fifteen carloads of said prunes" deny that defendants refused

to honor or accept or pay plaintiff's drafts for advances of "seventy-five per cent of the market value thereof," or that defendants refused "to receive or take, or accept or care for or sell the same, or permitted or allowed said fifteen carloads of prunes" to remain uncared for until they were damaged, or that plaintiff suffered damage thereby.

For a second defense, and in bar of the action, the answer alleges that defendants sued plaintiff in New York for \$1,351.31, being the balance alleged to be due them for moneys advanced and paid for services performed by them for plaintiff, "under and in pursuance of the contract set forth in the complaint in this action," and that in the New York action plaintiff set up as a counterclaim "the same cause of action" against the defendants herein "as is alleged against them in the complaint in the present action," and that judgment was rendered in the New York action in favor of defendants herein (plaintiffs therein) and that said judgment has become final.

For a "third defense" the answer sets up as a counterclaim the judgment in the New York action and alleges that "no part thereof has been paid." The pleadings are verified. The present plaintiff demurred generally to the answer, and to certain portions thereof he demurred on the further grounds of ambiguity and uncertainty. The demurrer was overruled, and the cause was tried by the court without a jury. Plaintiff offered no evidence in support of his complaint, whereupon defendants introduced in evidence an authenticated copy of the judgment-roll and the judgment rendered in their favor in the New York action and the deposition of the defendant McGovern as to the non-payment of the New York judgment. The court gave judgment in favor of the present defendants for the amount of the New York judgment set up in the counterclaim. To the New York judgment, or to its validity, no objection was made when introduced and no attack is made upon it in plaintiff's brief. Objection to McGovern's deposition was made, as will be hereafter noticed.

In its findings the court found the true name of John Doe Carey to be Frederick F., and that defendants "are and at all and singular the times mentioned in the pleadings herein have been copartners, doing business under the firm name

and style of Delafield, McGovern & Company," as alleged in the complaint and the answer; that "all and singular the allegations contained in paragraphs II and III of the plaintiff's complaint are and each of them is untrue"; "that all and singular the allegations contained in paragraphs IV, V, VI, VII, VIII, and IX of the defendants' supplemental and amended answer are and each of them is true." As conclusions of law the court found that defendants were entitled to judgment for the sum of \$2,160.40 and costs and that judgment be entered accordingly.

1. It is claimed that the demurrer should have been sustained because the answer was ambiguous and uncertain, as it did not deny all of the specific averments of the verified complaint, but was only a denial of their literal truth. In some particulars this is true, but in others the denials were sufficiently specific. It was permissible to deny the making of the contract as alleged and in the separate defenses admit its execution, for inconsistent defenses may be made even where the pleadings are verified. (*Banta v. Siller*, 121 Cal. 414, [53 Pac. 935].) There is no ambiguity in respect of the parties defendant. The complaint, in its caption, designates them by their individual names, describing them also as copartners under the firm name given, and the complaint contains an allegation that these individuals were copartners, but thereafter refers to them as defendants. The answer pursues the same course. The word "defendants" must be understood to refer to their alleged relation to each other. *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, [56 Pac. 468], cited by appellant, does not sustain their contention. In that case it was held that where several defendants are sued by their individual names, and described as partners, they may be referred to as defendants. But the court held that in such case an allegation that "the defendant" had not paid certain notes sued on, was an insufficient allegation of non-payment as to all the defendants. Demurrers for uncertainty and ambiguity, when improperly overruled, do not always work a reversal of the judgment, and will not do so when it appears that the matters complained of by demurrer have not affected any substantial right of the demurrant. (*Gassen v. Bower*, 72 Cal. 555, [14 Pac. 206]; *Alexander v. Central L. and M. Co.*, 104 Cal. 532,

[38 Pac. 410]; *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, [56 Pac. 468]; *Stephenson v. Deuel*, 125 Cal. 656, [58 Pac. 258]; *Williams v. Casebeer*, 126 Cal. 77, [58 Pac. 380].) In *Stephenson v. Deuel* the court said: "The ruling upon demurrer to defendant's amended answer on the ground of uncertainty and ambiguity cannot now avail plaintiff. The pleadings are verified and defendant's answer is deemed controverted. Where there is an answer and trial on the merits, the court will not reverse the judgment for ambiguity and uncertainty, unless it clearly appears that demurrer was prejudiced by the alleged infirmity in the pleading." In the present case plaintiff could not have been misled by the denials in the answer, and as to the affirmative defenses pleaded, which were independent of and separate from, and might well be inconsistent with, the denials of plaintiff's complaint, the allegations were free from ambiguity or uncertainty. Plaintiff made no attempt by evidence either to support his complaint or to controvert the evidence in support of the separate defenses. Conceding more or less ambiguity in the denials of the answer, it is quite clear that plaintiff was not prejudiced by the overruling of his demurrer.

2. It is also contended that the findings are conflicting and uncertain. This contention arises from the fact that the court found certain paragraphs of the complaint to be untrue and certain paragraphs of the separate defenses set forth in the answer to be true. Remembering that the plaintiff offered no evidence in support of his complaint, it was the duty of the court to find against him. The second defense was interposed as a bar to plaintiff's action, and no finding was necessary thereon after plaintiff's failure to offer any proof of his allegations. Coming to the findings on the counterclaim arising out of the New York judgment, there is no claim of any conflict. Conceding certain conflict, as claimed by plaintiff, in respect of other findings, the findings sustain the judgment as rendered, for it rests on the counterclaim. Looking to the findings in their entirety, as we may do to support the judgment, we think them sufficient.

3. It is also contended that the findings are contrary to and not sustained by the evidence because the court found that the firm of Delafield, McGovern & Co. was given judg-

ment upon the New York judgment, while the judgment offered in evidence was in an action wherein the individual members of the firm were plaintiffs. The evidence shows that the cause of action sued upon in New York accrued in the partnership capacity of the then plaintiffs; they, as defendants in the present action, are sued in like capacity and judgment is likewise given. There is no mistaking the fact that the defendants here and the plaintiffs in New York were the same.

4. Proof of non-payment of the judgment, after the judgment had been duly proved, was not necessary; the burden of proof of payment was then upon plaintiff. (1 Jones on Evidence, secs. 52, 53, 176; *Melone v. Ruffino*, 129 Cal. 514, [79 Am. St. Rep. 127, 62 Pac. 93]; *Stuart v. Lord*, 138 Cal. 672, [72 Pac. 142].) The deposition of defendant McGovern was taken at Seattle, and was admitted and read over the objection of plaintiff. His evidence was taken for the single purpose of proving non-payment of the New York judgment. He testified that up to the time he left New York, in August, 1902, (long after the present action was brought,) the judgment pleaded had not been paid. His testimony was competent as far as it went, but, of course, was insufficient to show non-payment at any subsequent date. His statements that the judgment had not been paid since he left New York were hearsay and inadmissible. But non-payment, we have seen, was presumed, and no evidence was offered to rebut that presumption. The error in admitting McGovern's deposition, if error, was harmless.

The judgment and order are affirmed.

McLaughlin, J., and Buckles, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 22, 1905.

[No. 39. Third Appellate District.—July 25, 1905.]

**MARY L. HUMPHREY, Respondent, v. LOUISA C. POPE,
Appellant.**

APPEAL—ARGUMENT—REVIEW.—An appellate court will consider only the assignments of error discussed in the appellant's brief, and will not prosecute an independent inquiry to find out reasons for or against the correctness of other rulings.

ACTION FOR ALIENATION OF AFFECTIONS OF HUSBAND—SUPPORT OF VERDICT.—In an action by a wife against another woman for alienation of the affections of her husband, where the testimony of the plaintiff and defendant, aside from a letter written by the latter, sustains the conclusion reached by the jury, it cannot be disturbed for insufficiency of the evidence.

ID.—INSTRUCTIONS—CONSTRUCTION—MALICIOUS INTENTION—BURDEN OF PROOF—DAMAGES.—The instructions in the action must be construed together in the light of the evidence before the jury; and when the instructions were not misleading nor prejudicial, and made it clear that there must have been a malicious intention to alienate the husband's affection from the wife, and to cause the separation, and properly defined the burden of proof, though omitting it in a single instance, and properly confined the damages recoverable to what should fairly seem the pecuniary loss of plaintiff, there is no reversible error therein.

ID.—INADMISSIBLE EVIDENCE—DECLARATIONS OF HUSBAND—INCOMPETENCY UNDER CODE.—The declarations of the husband made to the wife as to his relations with the defendant, and of his desire for a divorce to marry her, were incompetent under section 1881 of the Code of Civil Procedure, and were properly excluded under a general objection of incompetency, in the absence of a showing of the consent of the husband.

ID.—HEARSAY.—Such declarations were essentially incompetent as being mere hearsay evidence in the action for damages for alienation of his affections from the plaintiff by the defendant.

ID.—EVIDENCE—OTHER CAUSES OF SEPARATION—MITIGATION OF DAMAGES.—Any evidence tending to show that the separation or alienation of affection resulted from other causes than those alleged is admissible as bearing upon the necessary averment that the loss of *consortium* was due to defendant's conduct, evidence tending to show the unhappy relations of the parties and want of affection between them prior to the defendant's interference and intrigues would be admissible in mitigation of damages.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a ~~new~~ trial. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

Arthur L. Levinsky, and W. M. Gibson, for Appellant.

James A. Louttit, and Louttit & Middlecoff, for Respondent.

MCLAUGHLIN, J.—This is an action for damages caused by the acts of defendant in alienating the affection of plaintiff's husband, and abducting, persuading, and enticing said husband from plaintiff, and causing him to live separate and apart from her. The facts stated in the complaint are set forth in the decision on a former appeal (*Humphrey v. Pope*, 122 Cal. 255, [54 Pac. 847]), and hence it is deemed unnecessary to repeat them here. The defendant, answering the complaint, denied each material averment thereof. The cause was tried before a jury, and upon the verdict of the jury a judgment was entered against defendant for damages in the sum of two thousand dollars. From this judgment and an order denying her motion for a new trial defendant appeals. The bill of exceptions specifies particulars in which the evidence is insufficient to justify the verdict, and contains many assignments of error. We will notice only those assignments deemed worthy of discussion in appellant's briefs, for we cannot be expected to "prosecute an independent inquiry in order to find out reasons for or against the correctness of the rulings." (*People v. Woon Tuck Wo*, 120 Cal. 297; *Banister v. Campbell*, 138 Cal. 460, [71 Pac. 504, 703]; *Duncan v. Ramish*, 142 Cal. 686, [76 Pac. 661], *Whyte v. Rosencrantz*, 123 Cal. 634, [69 Am. St. Rep. 90, 56 Pac. 436]; *Taylor v. Bell*, 128 Cal. 306, [60 Pac. 853]; *City Sav. Bank v. Enos*, 135 Cal. 167, [67 Pac. 52].) There was sufficient evidence to warrant the verdict of the jury. The testimony of plaintiff and defendant, aside from the letter written by the latter, sustains the conclusion reached by the jury, and hence such verdict cannot be disturbed. (*Iburg v. Suanet*, 47 Cal. 265; *Brock v. Pearson*, 87 Cal. 581, [25 Pac. 963]; *Bradford v. Woodworth*, 108 Cal. 684, [41 Pac. 797]; *Shafer v. Willis*, 124 Cal. 36, [56 Pac. 635].) Instruction number eight, given at the request of plaintiff, was not erroneous. Instructions must be considered as a whole, and in the light of evidence introduced before the jury. While, therefore, an instruction

that "any act of another woman" by which a wife is deprived of her marital rights would, standing alone, be erroneous, we do not think the jury could have been misled in this instance. In instructions numbered five, six, seven, nine, eleven, and twelve, requested by defendant, the proposition was reiterated that the plaintiff could not recover unless it was shown by a preponderance of the evidence that the "defendant, contrivingly, willfully, wrongfully, and with the intent to injure the plaintiff, did maliciously alienate and destroy the affection of W. G. Humphrey for plaintiff"; and that she "maliciously and intentionally" caused the separation, by means of "malicious, contriving, willful or wrongful conduct," intended to alienate the husband's affection from his wife. This certainly made it plain to the jury that innocent or thoughtless acts, without any design to entice the husband from his wife, could not justify a verdict against defendant. The word "preponderance" was omitted in another instruction given at plaintiff's request, but what has just been said shows that the law relating to the burden of proof was fully and repeatedly called to the attention of the jury, and hence the omission, in a single instance, was not prejudicial. (*People v. Jackson*, 138 Cal. 465, [71 Pac. 566]; *People v. Morine*, 61 Cal. 372.) We think the appellant has no reason to complain of the instruction relating to the measure of damages, which carefully confines damages recoverable to "what shall fairly seem the pecuniary loss of plaintiff." It contains no mention of children, gifts, or allowances, and is therefore not subject to the objection urged. During the examination of plaintiff she was permitted to testify as to what her husband said to her, with reference to the defendant, during the existence of the marriage relation, as follows:

"Q. Mrs. Humphrey, coming down to the time of the second marriage with Mr. Humphrey, I will ask you what he said, if anything, with reference to the defendant during the period of that marriage, giving us any conversation you had with him in reference to it, commencing with the first event you recall—the first conversation you had with him in reference to the defendant?

"Counsel for defendant objected to the question as wholly incompetent, irrelevant, and immaterial, and not binding

upon the defendant unless in her presence, and the court overruled said objection. To which ruling counsel for defendant then and there duly excepted.

"A. Well, the first was, I objected to his going at her beck and call, and he told me that she had plenty of money, and she wanted him, and it seemed as if he couldn't resist her."

In response to similar questions, to which the same objection was interposed, the same ruling had and exceptions reserved, the plaintiff was further allowed to testify: I. "He came home with both of his coat pockets silver in them, seemed to be about half full, and he said the money was hers, and she had gave it to him to spend just as he pleased, and she said he shouldn't work any more." II. "And he thought of giving up—that is, he was going to give up his business in town and take charge of the ranch, and he would have to get a divorce from me, as she demanded him to marry her, as it was not right for him to stay out there without they were married. He had been going out there; and he did afterwards. On these trips he told me he was going to the ranch he remained away from home one, two, and three nights at a time." III. "Well, he told me that he could not get a divorce, but he asked me if I would, so that he could marry her. He said she wanted to be one of the four hundred, and she thought by marrying him they could be." IV. "Well, he said he wanted me to go ahead and get a divorce; give him a chance; that he would stop our income and starve me out; compel me to leave the house." These and other rulings touching the same line of evidence are assigned as error, appellant contending that the evidence was purely hearsay and was also inadmissible under section 1881 of the Code of Civil Procedure. Respondent, however, contends that this evidence was a part of the *res gestae* and admissible under exceptions to the rule excluding hearsay evidence; and also urges that the objection was not specific enough to invoke the inhibition contained in section 1881. The latter contention rests on the proposition that the objection should have extended to the competency of the witness. It has been repeatedly held that where evidence objected to is absolutely incompetent, the general objection is sufficient. (*Nightingale v. Scannell*, 18 Cal. 324; *Swan v. Thompson*, 124 Cal. 196, [56 Pac. 878]; *Spelling on New Trial*, sec. 288.) And the solution of the question

now under consideration depends upon whether the plaintiff's evidence falls within this rule. We can readily see why an objection to the competency of experts, children under ten years of age, and persons of unsound mind, *as witnesses*, would be necessary. We can also understand why the specific objection, that particular communications between attorney and client, physician and patient, priest and penitent, were privileged, must be urged. But the lips of both husband and wife are forever sealed as to *all* communications between them during the marital relation, unless consent is shown or the cause of action falls within the exceptions. Neither spouse can be *examined as to such communications*, without the consent of the other, and in our opinion the *evidence* is incompetent unless this consent is shown. In *People v. Mullings*, 83 Cal. 144, [17 Am. St. Rep. 233, 23 Pac. 229], this precise question was passed upon by our supreme court, and it was there said: "Other objections were made to similar questions which did not expressly state the ground of 'privilege,' but which did state, among other things, that the question was 'not in cross-examination, and incompetent.' The word 'incompetent,' under the circumstances, was sufficiently broad to include the ground of objection under review. Such questions were 'incompetent'—that is, apart from the consideration of relevancy and materiality, they were incompetent, because prohibited by law." And in another part of the same decision the court repeats that "*the questions themselves were incompetent.*" In *People v. Warner*, 117 Cal. 638, [49 Pac. 841], the objection was "that the *matter* was incompetent and not in cross-examination," and the court there say: "Nor is there anything in the suggestion that the objection was insufficient in form to include the ground now urged. (*People v. Mullings, supra.*)" In other cases the *evidence* is spoken of as competent or incompetent. (*Harrison v. Sutter St. Ry. Co.*, 116 Cal. 166, [47 Pac. 1019]; *In re Mullin*, 110 Cal. 254, 42 Pac. 645.) In a Michigan case almost identical with the one at bar, it was said: "Plaintiff was allowed to testify to conversations between himself and his wife which did not occur in the presence of defendant, the record not showing that the wife consented to his testifying. This was contrary to section 7546, 3 How. Stat., as repeatedly construed by this

court." The statute referred to contains only the general prohibition found in the first two sentences of section 1881, and that case is, therefore, exactly in point. The reason of the rule requiring specific objections in certain cases is entirely wanting here. The relation being shown, the law absolutely prohibited the *examination* of the wife touching communications during coverture. (Jones on Evidence, secs. 751, 754, 764.) The questions were therefore objectionable from every standpoint, and in such cases specific objection is not demanded. "There is no reason for it, and where the reason is not present the rule fails." (*Swan v. Thompson*, 124 Cal. 196, [56 Pac. 878].)

But aside from the objectionable feature of this evidence above discussed, we are satisfied that as far as it was calculated to prove declarations by defendant to plaintiff's husband, it was hearsay pure and simple. There can be no doubt that the conduct and declarations of defendant material to the issue could be shown. But we cannot subscribe to the doctrine that the exigencies of this or any kindred case could justify a radical departure from well-settled rules excluding hearsay evidence of the character under consideration. The doctrine of *res gestae* does not dispense with cardinal rules of evidence, requiring the best evidence in degree touching declarations or any other relevant fact. Declarations and admissions, whether part of the *res gestae* or admissible under other exceptions to the rule excluding that character of evidence, are hearsay, and to permit them to be proven, by one other than the person hearing the statements from the lips of the declarant, would be to prove hearsay by hearsay, and this is not permissible. (*Estate of James*, 124 Cal. 658, [57 Pac. 578, 1008]; *In re Calkins*, 112 Cal. 296, [44 Pac. 577]; *Estate of Gregory*, 133 Cal. 138, [65 Pac. 315]; Code Civ. Proc., secs. 1823, 1825, 1829, 1845, 1846, 1848, 1850, 1870; Jones on Evidence, secs. 197, 207, 216, 237, 297, 299, 347, 348, 351, 353; Greenleaf on Evidence, secs. 82, 108, 110, note 2, 124.) Yet that would be the effect of permitting plaintiff to testify as to what her husband told her touching defendant's declarations and acts. "Evidence of the oral admissions of a party" must be received with caution. (Code Civ. Proc., sec. 2061; Jones on Evidence, sec. 297.) And it would be throwing caution to the winds to permit a class of evidence so fraught with

danger and temptation and so liable to errors and mistakes due to human forgetfulness and fallibility. (Jones on Evidence, sec. 297.) It is but fair to counsel for respondent, and to the trial court, to say that authorities cited fully sustain the opposite view. (*Edgell v. Francis*, 66 Mich. 303, [33 N. W. 501]; *Williams v. Williams*, 20 Colo. 51, [37 Pac. 614], and cases therein cited.) As the point is new in this state, we have endeavored to reach a conclusion in consonance with sound reason, believing that good law is always supported by good logic. And with all deference to the courts enunciating a rule favorable to the admissibility of such evidence, we are constrained to say that the reasoning upon which such rule is based is far from convincing, and we cannot concur in their view. We think the correct rule was laid down by the supreme court of Ohio in the following terse language: "The words and acts of the defendant Griffin repeated by the wife to the husband, and detailed by him in evidence to the jury, were nothing but hearsay and in themselves clearly inadmissible." (*Preston v. Bowers*, 13 Ohio St. 1, [82 Am. Dec. 430]; *Westlake v. Westlake*, 34 Ohio St. 634, [32 Am. Rep. 397, and note]; *Huling v. Huling*, 32 Ill. App. 521; *Higham v. Vanosdol*, 101 Ind. 164.) It follows that the rulings were erroneous. We cannot say what the judgment-roll excluded by the court may have contained, and, as appellant must show error affirmatively, the presumption is that the ruling was correct. As the case must go back for a new trial, it may be remarked that any evidence tending to show that the separation or alienation of affection resulted from other causes than those alleged is admissible as bearing on the necessary averment that the loss of *consortium* was due to defendant's conduct. Evidence tending to show unhappy relations and want of affection between the spouses prior to defendant's interference or intrigues would also be admissible in mitigation of damages. (*Hadley v. Heywood*, 121 Mass. 239; *Waldron v. Waldron*, 45 Fed. 315; *Rudd v. Rounds*, 64 Vt. 440, [25 Atl. 438]; *Fratini v. Carlini*, 66 Vt. 275, [44 Am. St. Rep. 843, and note, 29 Atl. 252].)

The judgment and order are reversed.

Bucklea, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 23, 1905.

[No. 44. Third Appellate District.—July 25, 1905.]

K. ALBERRY, Respondent, v. BEN F. GEIS, Appellant.

PARTNERSHIP—DISSOLUTION—IMPROPER JUDGMENT FOR BALANCE DUE—INSUFFICIENT ACCOUNTING.—A judgment in favor of one partner for a balance of accounts of money between the partners after dissolution of the partnership cannot be sustained where no account appears to have been taken of outstanding indebtedness which the firm might be owing to any other person, nor of any claims the firm may have against any person, nor of any firm assets other than those mentioned in the findings, and where there is no statement or finding that all of the assets have been exhausted.

Id.—IMPORT OF ACCOUNTING—WINDING UP OF PARTNERSHIP.—An accounting of a dissolved partnership means that there is to be a complete winding up of the affairs of the partnership.

APPEAL from a judgment of the Superior Court of Glenn County. Charles M. Head, Judge presiding.

The facts are stated in the opinion of the court.

William M. Finch, for Appellant.

Frank Freeman, and Charles L. Donohoe, for Respondent.

BUCKLES, J.—These parties are lawyers residing at the town of Willows, and on January 1, 1899, entered into a copartnership to practice law. The said copartnership was mutually dissolved January 1, 1903. The complaint herein alleges that the defendant has collected sums of money belonging to the late firm which he has not paid over. At the time of the dissolution there was no accounting nor disposition made of the assets of the firm nor of the debts due the firm, but the parties did enter into an agreement whereby each should collect the debts due the firm, make statements thereof and pay over to the other what might be due him.

The complaint further alleges that the defendant has collected about three thousand five hundred dollars which he has not accounted for, and has not paid over to plaintiff his share, then demands an accounting and judgment for whatever may be found due. The defendant admits, alleges, and also demands an accounting and judgment for whatever may be found due him from plaintiff.

The judgment was a personal judgment in favor of the plaintiff for \$200.39, and this appeal comes here upon the judgment-roll alone. Findings were made, and the only finding that there was any kind of an accounting of the partnership affairs is found in finding No. IV, as follows: "That during the term of said copartnership and since the dissolution thereof plaintiff has received from moneys due said firm the sum of \$1,358.83 and has paid out on account of expenses of said firm the sum of \$5.87, being \$1,352.76 over and above what he has expended; that during said time the defendant has received from moneys due said firm the sum of \$2,253.55 and paid out on account of expenses of said firm the sum of \$500.00, being \$1,753.55 over and above what he has expended and being \$400.79 in excess of that received by plaintiff."

As conclusion of law the court finds that plaintiff is entitled to a decree—1st, "For an accounting between plaintiff and defendant, which has now been had in the action." If anything is due either party in this action it must be determined after a full and complete accounting of the copartnership affairs. The recitals of the finding do not show that any account has been taken of outstanding indebtedness the firm might be owing to any other person, nor of any claims the firm may have had against any person, nor of any firm assets other than those mentioned in said finding, and no statement or finding that all the assets had been exhausted. An accounting means that there is to be a complete winding-up of the affairs of the partnership.

Upon the authority of *Clark v. Hewitt*, 136 Cal. 77 [68 Pac. 303], the judgment herein must be reversed, and it is so ordered.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 48. Third Appellate District.—July 25, 1905.]

WILLIAM GRANT, Appellant, v. JUSTICE'S COURT OF SECOND TOWNSHIP, COUNTY OF TUOLUMNE, and JAMES G. FALLON, Justice, Respondents.

JUSTICE'S COURT—NOTICE OF TRIAL—REQUEST FOR APPEARANCE—JURISDICTION—KNOWLEDGE OF JUDGMENT—FAILURE TO APPEAL—WRIT OF REVIEW—DISMISSAL.—A defendant served with summons from a justice's court, though residing elsewhere, who requested a co-defendant to appear for him, who did so, and was served with notice of trial, as his attorney, and informed him of the time and place of trial, had sufficient notice thereof to give the court jurisdiction to render judgment against him; and when he had sufficient knowledge of the judgment and failed to appeal, his petition for a writ of review, after the time for appeal had expired, was properly dismissed.

APPEAL from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

John B. Curtin, and O. K. Cushing, for Appellant.

The appellant had no legal notice of the trial, and the court had no jurisdiction to render a judgment against him. (*Jones v. Justice's Court*, 97 Cal. 524, 32 Pac. 575; *Elder v. Justice's Court*, 136 Cal. 366, 68 Pac. 1022.)

J. C. Webster, for Respondent.

The judgment was appealable, and the defendant, having knowledge of it, and having failed to appeal, the writ of review was not permissible. (Code Civ. Proc., sec. 1068; *Fant v. Mason*, 47 Cal. 8; *Miliken v. Huber*, 21 Cal. 169; *Bennet v. Wallace*, 43 Cal. 26; *In re Stuttmeister*, 70 Cal. 323, 12 Pac. 270; *Weldon v. Superior Court*, 138 Cal. 129, 71 Pac. 502; *Ellege v. Superior Court*, 131 Cal. 280, 63 Pac. 360.)

BUCKLES, J.—This is an appeal from the judgment of the superior court of Tuolumne County dismissing a writ of review sued out in said court to review the judgment of the justice's court of the second township of said county. There

is no bill or statement, and the appeal will be heard on the judgment-roll alone. The writ of *certiorari* was issued, and when the matter came on to be heard on the return the defendant moved to dismiss the writ on the ground that the petition or record does not show facts sufficient to entitle plaintiff to the writ. It was thereupon stipulated in open court by the respective parties that the said motion to dismiss and the said cause be heard and submitted together. The court found, among other things: "2nd. That on or about the 27th day of June, 1903, an action was commenced by one Louis Lepape against the above-named plaintiffs and one Chas. E. Grant, in the said justice's court, which said action is entitled 'Louis Lepape, plaintiff, vs. William Grant, George F. Grant, and Charles E. Grant, defendants,' . . . brought to recover the sum of \$106 and costs," for services performed, etc. In the fourth finding is the following: "That on the 22nd day of July, 1903, a legal summons therein was duly served on said defendant, William Grant, in said county of Tuolumne. That thereafter on July 30th, 1903, Charles E. Grant, one of said defendants, appeared in court before the said justice, and on behalf of himself and William Grant and George F. Grant, his brothers and co-defendants, made a verbal answer denying generally and specifically each and every allegation contained in said complaint of plaintiff. That said defendant, William Grant, had orally requested said Charles E. Grant to so appear and answer for him, and the said Charles E. Grant, in pursuance of said oral request and not otherwise, did appear and enter said answer as aforesaid, but said defendant, George F. Grant, had not authorized said Charles E. Grant to appear for him nor had said George F. Grant been served with summons in said action." In the fifth finding is the following: "That on October 20th, 1903, the cause was duly set for trial by the court for October 31st, 1903, at 10 o'clock A. M., and notice of the time and place of trial issued in due form as required by section 850 of the Code of Civil Procedure, directed to the defendants above named and to Charles E. Grant, their attorney, which said notice of the time set for said trial was duly served upon Charles E. Grant as attorney for said defendants, and the proper return of service made thereon on October 20th, 1903," by the constable. In the sixth finding there is the following:

"That said William Grant, prior to the date of the trial of said action, received information from Charles E. Grant by telephone of the date fixed by said court for the trial of said action, and on October 27th, 1903, said William Grant wrote a letter to said justice of the peace, and which said letter was received by said justice," wherein he calls attention to the fact of the said suit pending, that his brother Charles had been legally notified that the case was set for trial, and that he and his brother George F. knew it only by hearsay; calling the justice's attention to section 850 of the Code of Civil Procedure, and declared the case was set without consulting his convenience, and as that date was not convenient to him he would stand on his legal rights, and informing the justice, "I will be in Tuolumne County next week, and will then see counsel and arrange for a day of hearing that will be mutually satisfactory." It is further found by the court, "That no request was made by defendant, William Grant, for a continuance of the trial of said action from October 31st, 1903, to any other date." Finding 7th: "That on the 31st day of October, 1903, after receiving said letter, said cause came regularly on for trial, J. C. Webster, Esq., appearing as attorney for plaintiff, and Charles E. Grant, who had made answer for the defendants, as aforesaid, appeared and announced that he did not consider himself the attorney for the defendants, William Grant and George F. Grant, that no other appearance was made at said trial for said William Grant and George F. Grant, whose default for not appearing at the trial of said cause was entered. Evidence was adduced on behalf of the plaintiff, and upon the evidence adduced the court rendered its judgment therein in favor of said plaintiff, Louis Lepape, and against defendants, William Grant and George F. Grant, for the sum of \$106 and costs of suit allowed at \$6.50. The said Charles E. Grant testified and was dismissed as a defendant in said action." The eighth finding is that the said William Grant had notice of said judgment and on the second day of November, 1903, telegraphed the said justice that "The judgment against me and my brother George is void, and you and your bondsmen are liable if same is enforced. See *Elder v. Justice's Court*, one hundred and thirty-six California, page three hundred and sixty-four," [68 Pac. 1022].

The justice probably did see Elder's case, but, if he did, must have concluded it had no application, for he proceeded to enforce said judgment by issuing execution, notwithstanding William's threat.

I have quoted enough of the findings to determine whether the findings would warrant the judgment which the court made. It might be well to state further that the court found that the said judgment rendered by said justice was an appealable judgment, and that neither William Grant nor George F. Grant had appealed from the same nor any part thereof, and that more than thirty days had elapsed since the rendition and entry of said judgment, and before the filing of the petition for the writ of review herein.

As conclusions of law, the court found:—

"That the petitioners are entitled to a judgment annulling the judgment entered by the justice of the peace of the second township of Tuolumne County in favor of Louis Lepape and against Geo. F. Grant, and all subsequent proceedings upon said judgment as against said Geo. F. Grant.

"That all the proceedings had and taken in said justice's court in said action in favor of said Louis Lepape against said William Grant are hereby affirmed, and judgment accordingly so ordered.

"That the facts are not sufficient to support the writ of *certiorari* heretofore issued as to William Grant, and defendants are entitled to a dismissal of the said writ as to said William Grant."

The superior court thereupon rendered its judgment annulling the judgment and subsequent proceedings of the justice as to the said George F. Grant, and affirming the judgment of said justice in said action in favor of said Louis Lepape and against said William Grant, and dismissing the said writ of review.

We think the findings support the judgment. The only question in the case of any importance is whether William Grant's notice that the case was set for trial in the justice's court was sufficient, and we think it was. While not a resident of Tuolumne County, he was served with a summons in that county, and directed his brother to appear and answer for him, which his brother did. His brother was served as his attorney with the notice required under section 850 of

the Code of Civil Procedure, stating the time and place of trial of the action, and his said brother notified him. If his notice was technically insufficient, he *did* know the trial was set to take place on a certain day, and he *did* know within two days after the judgment was rendered that it had been rendered, and he could have appealed, and we think that was his remedy for any error he complains of.

It is suggested that no presumption be indulged in in favor of the justice's court. There is no occasion to indulge in any presumptions in this case, for the record of the justice is before us in one of the findings of the court. We think, under all the circumstances of this case and appearing in the court's findings, the notice the appellant had of the time set for the trial in the justice's court was sufficient. In *Jones v. Justice's Court*, 97 Cal. 524, [32 Pac. 575], cited by appellant, the defendants had *no* notice that the case pending in the justice's court had been set for trial. In *Elder v. Justice's Court*, 136 Cal. 366, [68 Pac. 1022], relied on by the appellant, the party seeking the writ had no notice, or, in other words, the justice called his attorney up on the telephone and stated to him that the attorneys on the other side desired to have the case set for trial on May 3, 1899, at ten A. M. The attorney had but little recollection of the case, as the answer had been filed four years before, but replied that he did not know where the defendant was, but it was all right to go ahead. Neither attorney nor defendant appeared at the trial. There was no showing and no return of notice having been served. In *Los Angeles v. Young*, 118 Cal. 296, [62 Am. St. Rep. 234, 50 Pac. 534], there was a return made that the service was made on the attorney, but the attorney was permitted before the superior court to testify that he did not know who signed the acknowledgment of service, and in fact he had never received notice of the time set for hearing, and upon this the lower court, on a writ of review, annulled the judgment of the justice's court. The supreme court reversed this judgment, holding that Dunn could not testify in a proceeding of this kind to impeach the service, and held there was evidence of notice having been served, just as there was in this case. So far as we have been able to ascertain in all these cases where the writ of review has been held to be the remedy, it has been where there was no

power of appeal, or where the time for appeal had gone by without fault of the petitioner. In fact, looking at the statute, we find the writ may issue where there can be no appeal, or when, in the judgment of the court, there is no plain, speedy, and adequate remedy. (Code Civ. Proc., sec. 1068.)

In this case the justice did not proceed to try the case without having first set the case for trial and notified the parties, and his record, which was certified up to the superior court, shows that notice of the time and place of trial was served upon the attorney of appellant, and it shows the evidence on which the justice acted in holding that notice was served as required under section 850 of the Code of Civil Procedure. There is no question but William Grant could have taken an appeal, for, as has appeared, he knew of the justice's judgment within two days after it was rendered. No litigant should be permitted the use of the writ of review where he has the right of appeal. Nor should he be allowed the writ where he slumbers on his right of appeal until the time in which he might take such appeal has gone by.

The judgment of the lower court is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 140. Second Appellate District.—August 3, 1905.]

T. J. WELDON, Respondent, v. RALPH ROGERS, Appellant.

DISTRICT COURTS OF APPEAL—JURISDICTION—TRANSFER TO SUPREME COURT.—An appeal involving the enforcement of a judgment for more than two thousand dollars is not within the jurisdiction of the district courts of appeal, and if taken thereto will be transferred to the supreme court, to which it should have been taken.

APPEAL from an order of the Superior Court of Los Angeles County refusing to set aside an order for the enforcement of a judgment. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

McNutt & Hannon, Will D. Gould, and James H. Blanchard, for Appellant.

Louis Luckel, for Respondent.

SMITH, J.—Judgment was entered against the defendant, in favor of T. J. Weldon, April 2, 1891, for the sum of two thousand dollars, with interest at two per cent a month, from March 1, 1887, aggregating \$3,960, and with costs, \$3,979.15. Weldon died August 25, 1894; and on the tenth day of April, 1905, on the motion of Sophie B. Weldon, claiming to be executrix of the last will of the original plaintiff, then deceased, an order was made by the court below “that execution issue, and that the said judgment be enforced in favor of Sophie B. Weldon, executrix of the last will and testament of said T. J. Weldon, deceased, plaintiff herein, and against the defendant, Ralph Rogers, for the sum of \$3,979.15, with interest from April 2nd, 1891, at the rate of seven per cent per annum, now amounting to \$7,879.44.” Thereupon a writ of execution was issued, but in whose name as plaintiff does not appear from the record before us. Nor does it appear that any order was made by the court at any time to revive the action in the name of the executrix. Thereafter, on the fourteenth day of April, 1905, after due notice, the defendant moved the court to set aside the order of April 10, 1905, and to quash the execution thereon issued; and the motion coming on to be heard on May 22, 1905, was denied by the court. From this order the defendant appealed,—giving only the undertaking provided for in section 941 of the Code of Civil Procedure,—and now, pending the appeal, moves the court for a writ of *supersedeas* directed to the lower court, “requiring said court and its officers to stay proceedings on the order made and entered in said court on the 10th day of April, 1905,” etc., “and . . . on the writ of execution issued in pursuance of said order on said 10th day of April, 1905.”

Upon this state of the case, it is clear—whether we have regard to the amount of the original judgment, or that involved in the order of April 10, 1905—that the appeal should have been taken to the supreme court. It only remains for us, therefore, under the provisions of the constitution, and rule XXXII of the supreme court, to transfer the case, together with the pending motion, to that court; and it is so ordered.

Gray, P. J., and Allen, J., concurred.

[No. 7. Second Appellate District.—August 3, 1905.]

MARIA ESPERITU CHIJULLA DE LEONIS, Appellant,
v. W. A. HAMMEL, Sheriff, etc., et al., Respondents.

QUIETING TITLE—PLEADING—STATEMENT OF FACTS—EQUITABLE RELIEF.—Although an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments commonly made in such an action, yet where the facts upon which the plaintiff's claim is based are alleged, and there is a prayer for general relief, the court can grant any proper relief within the limitations of section 580 of the Code of Civil Procedure.

1d.—APPROPRIATE EQUITABLE REMEDIES.—Appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing and enforcing trusts, or determining the priorities of opposing equities may be had between proper parties, under our system, whenever they are required upon equitable considerations, and are justified by the pleadings and proof.

1d.—SUFFICIENT COMPLAINT—DEMURRER IMPROPERLY SUSTAINED.—Where the facts alleged in the complaint show that plaintiff's title is paramount to any claims of lien by the defendants, and that she is entitled to have her rights determined, and there is no defect of necessary parties or uncertainty as to the facts, a demurrer thereto was improperly sustained.

1d.—PARTIES.—The failure to join proper parties, not appearing to be necessary parties, is not ground of demurrer for defect of parties. But if it should appear at any time during the progress of the cause that the presence of other parties than those named in the complaint is necessary to a complete determination of the controversy, they can be brought in.

1d.—UNCERTAIN LEGAL CONCLUSION FROM FACTS.—Where the facts are alleged with certainty, uncertainty as to legal conclusions therefrom is not ground of demurrer.

1d.—CONSTRUCTIVE TRUST—DEED AS MORTGAGE—NOTICE OF EQUITIES—STATUTE OF LIMITATIONS—RELIEF FOR FRAUD—INAPPLICABLE PROVISION.—Whether the complaint shows a constructive trust in the legal title procured by fraud, or shows a deed intended as a mortgage, with notice of plaintiff's equities to all of the defendants, the three years' limitation to an action for relief on the ground of fraud prescribed by subdivision 4 of section 338 of the Code of Civil Procedure is inapplicable.

1d.—MOTION FOR NONSUIT—GROUND NOT SPECIFIED.—A motion for a nonsuit must be held to have been erroneously granted where the record fails to show any specified ground for the motion.

APPEALS from a judgment upon demurrer and from a judgment of nonsuit in the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Dunnigan & Dunnigan, for Appellant.

Horace Bell, and H. H. Appel, for Respondents.

TRASK, J. (*pro tem.*).—Two appeals have been taken in this case. The first appeal is from the judgment in favor of certain defendants, rendered because of plaintiff's failure to amend her complaint within the time allowed by law after their demurrer thereto was sustained. The second appeal is from a judgment of nonsuit. By stipulation, both appeals have been submitted upon the same transcript.

The substance of the lengthy complaint will be stated so far as necessary for the purposes of this decision.

From the complaint it appears that plaintiff is an ignorant Indian woman. On July 31, 1894, she deeded certain real property to one Laurent Etchepare. For several years prior to the date last mentioned he had been her agent, and her attorney-in-fact in the management of her business and of her litigation as to her property. She made this deed because of her confidence in Etchepare, and because of her belief in his representations and those of an attorney whom Etchepare had induced her to consult. Among other representations made by Etchepare, it should be noted that he stated that she was indebted to him in the sum of sixteen hundred dollars, on account of moneys he had expended in her litigation and in the care of her property over and above what he had received from sales of cattle, and from rents, and that it would be to her advantage to convey all her property to him, and "that he could thereby be better able to settle her estate" (evidently referring to the estate of her deceased husband and the litigation relating thereto). It was also represented to her that Etchepare had been advancing her moneys for her support and maintenance, and that it would be proper and advisable for her to convey her property to him and that he would take care of it for her and defend her rights against adverse claimants. These and other

representations, which are stated, are alleged to be untrue. From all the averments made in respect to the matter of the execution of this deed, it is doubtful whether it should be treated as a mortgage to secure past and future advances, or as having been procured by fraud and misrepresentation and without consideration, in which latter event a constructive trust would be created in favor of plaintiff.

On February 12, 1895, Etchepare executed a mortgage on the property to defendant Elizabeth Murray to secure the payment of his note given for a loan made by her to him. A decree foreclosing this mortgage was rendered April 5, 1897, in an action brought by Miss Murray. Plaintiff and Etchepare were parties defendant in that action. A part of the relief asked in this action is an injunction restraining defendant Hammel, as sheriff from selling the premises mortgaged to Miss Murray, in pursuance of said decree. One ground upon which this relief is sought is that the sheriff's deed, if issued to a purchaser at such sale, would cloud plaintiff's title to her property.

On August 16, 1898, Etchepare conveyed an undivided one-half interest in the property deeded to him by plaintiff to defendant Labaig, and on the same date he conveyed the other undivided one-half to one Mrs. Appel. Later, Mrs. Appel conveyed an undivided one-half of the interest deeded to her to defendant Marie Le Mesnager. Thereafter Mrs. Appel died testate, and defendant Julia A. Shepherd is the executrix of the former's estate.

In October, 1898, Etchepare executed a mortgage on all the property deeded to him by plaintiff to defendants Bell and Appel to secure the payment to them of two thousand dollars. Bell afterwards assigned his interest in said mortgage to one Gibson, and Appel assigned his interest therein to defendant Julia A. Shepherd. Thereafter, in an action to which Julia A. Shepherd, as executrix and individually, said Gibson, and defendants Appel, Bell, and Labaig were parties, it was adjudged that said mortgage to Bell and Appel "was a valid lien as to the said" Etchepare, Labaig, Julia A. Shepherd, executrix, "the said mortgagees, and their assigns, upon the lands therein described in said mortgage."

The representations made to plaintiff whereby she was induced to execute the deed to Etchepare, the situation and

relation of the parties thereto, the circumstances and facts of that transaction showing fraud, misrepresentation, and want of consideration, and plaintiff's lack of education, business ability, and experience, are all alleged. And it is also averred that all of the parties to the deeds, mortgages, and assignments mentioned that were made subsequent to the execution of plaintiff's deed to Etchepare took every such deed, mortgage, or assignment thereof, with notice and knowledge that her said deed was procured by misrepresentation, fraud, and without consideration, as alleged in the complaint. It is further shown that all of the transactions subsequent to plaintiff's deed were had without her knowledge or consent; that she never received any benefit therefrom; and that the deeds executed by Etchepare, as well as some of the assignments mentioned, were without consideration. It is not shown who has been in possession of the property since the execution of the plaintiff's deed.

The substance of the prayer of the complaint is, that plaintiff be decreed to be the owner in fee simple of the land described in her deed to Etchepare; that it be decreed that neither of the defendants has any right, title, or interest therein; that her title thereto be quieted against all the defendants; that the defendant Hammel, as sheriff, be enjoined from making a sale under the decree in the foreclosure action; and that plaintiff have all other and proper relief.

The action was dismissed as to defendants Labaig and Le Mesnager.

The remaining defendants demurred to the complaint on several grounds—one ground being for insufficiency of facts; another for uncertainty, in that the complaint does not show what estate or property the plaintiff claims; another for defect of parties, in that Etchepare and Gibson had not been joined as parties defendant; and on the further ground that plaintiff's cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. Defendant Murray's demurrer was overruled, and the demurrer of the others was sustained. The correctness of the latter ruling is questioned by the first appeal.

1. From the prayer of the complaint it may be inferred that the pleader regarded the action as being substantially one brought to quiet plaintiff's title and to obtain ancillary in-

junctive relief. An action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title, under a complaint containing only the usual averments commonly made in such an action. (*Chase v. Cameron*, 133 Cal. 231, [65 Pac. 460].) But where, as here, the facts upon which plaintiff's claim is based, are alleged, there is authority to grant any proper relief within the limitations of section 580 of the Code of Civil Procedure. And appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing or enforcing trusts, or determining the priorities of opposing equities, may be had, as between proper parties under our system, whenever they are required upon equitable considerations and are justified by the pleadings and proof in the case. (*Campbell v. Freeman*, 99 Cal. 546, [34 Pac. 113]; *Tuffree v. Polhemus*, 108 Cal. 670, [41 Pac. 806]; *Collins v. O'Laverty*, 136 Cal. 31, [68 Pac. 327]; *Zellerbach v. Allenberg*, 99 Cal. 57, [33 Pac. 786]; *Rollins v. Forbes*, 10 Cal. 299; *Angus v. Craven*, 132 Cal. 691, [64 Pac. 1091].) Since general relief was demanded, the prayer of this complaint need not be considered further in determining whether or not the demurrer was properly sustained. (*Rollins v. Forbes*, 10 Cal. 299; *Angus v. Craven*, 132 Cal. 691, [64 Pac. 1091].)

If the allegations of the complaint are true, plaintiff's title is paramount to that of any defendant claiming a lien by mortgage. (*Murray v. Etchepare*, 129 Cal. 318, [61 Pac. 930].) Whether her deed to Etchepare was procured by fraud and without consideration, as alleged, or whether it was in fact a mortgage, as was once found (*De Leonis v. Walsh*, 145 Cal. 199, [78 Pac. 637]), is immaterial on this demurrer, for, in any event, she is entitled to have her rights determined. Though it is conceded that Etchepare and Gibson were proper parties, it does not appear from the complaint that they were necessary parties. But if it should appear at any time during the progress of the case that the presence of parties other than those named by the complaint is necessary for a complete determination of the controversy arising on issues made by the pleadings, they can be brought in. (Code Civ. Proc., sec. 389.)

The demurrer was not well taken for defect of parties. Nor should it be sustained for uncertainty, since the facts

are alleged. In one view, it may be concluded from the facts that Etchepare acquired only the naked legal title. This he would hold under a constructive trust which would arise in favor of plaintiff. (*Hays v. Gloster*, 88 Cal. 560, [26 Pac. 367].) But possibly the correct view of the matter, looking to facts alleged, and not to the pleader's conclusions, is, that the deed was intended as, and was, in fact, a mortgage. This conclusion is strengthened from the fact that it is not shown that Etchepare's agency did not continue after the execution of the deed, nor that he did not continue to receive and disburse large sums of money and to render services subsequently, as he had prior, to that time. If the latter view is correct, the legal title did not pass by this deed, and subsequent purchasers or encumbrancers with notice would acquire no rights as against plaintiff. In either event, the particular statute pleaded in bar is inapplicable. (*Hecht v. Slaney*, 72 Cal. 363, [14 Pac. 88]; *Goodnow v. Parker*, 112 Cal. 437, [44 Pac. 738]; *Nougues v. Newlands*, 118 Cal. 102, [50 Pac. 386].)

2. Defendant Murray answered after her demurrer was overruled, and the case went to trial between her and plaintiff, they being then the only parties before the court.

Upon this trial after plaintiff had rested, a motion for nonsuit was made in behalf of Miss Murray. This motion was granted, and judgment was rendered accordingly.

The record does not show that any specification was made of the grounds of this motion. For this reason plaintiff urges that the latter judgment should be reversed. Miss Murray's counsel answer this contention by saying that they expect to show that the grounds of the motion for the nonsuit were specified, and that same were sufficient in form and substance to justify the order; and that, "at the proper time," they propose "to suggest a diminution of the record." No such suggestion has been made. It is admitted in appellant's brief that such general grounds as "that there was no evidence to sustain plaintiff's cause of action," and "that there was no evidence to sustain plaintiff's complaint," were stated at the time the motion was made.

It is probable that the reason why the motion for a nonsuit was granted was for defect of proof that Miss Murray took her mortgage with notice of the fraud, misrepresentation,

failure of consideration, and other matters alleged with respect to the execution of the deed from plaintiff to Etchepare.

But in the absence of any showing in the record that this was specified as a ground for the motion, it must be held that the granting of the motion was error. For if this ground had been specified, it may have been possible that plaintiff could have offered more evidence on this branch of the case, if permission had been asked and granted, and that she would have asked to reopen her case for such purpose. (*Daley v. Russ*, 86 Cal. 114, [24 Pac. 867]; *Bronzan v. Drobaz*, 93 Cal. 647, [29 Pac. 254]; *Coffey v. Greenfield*, 62 Cal. 602; *Belcher v. Murphy*, 81 Cal. 39, [22 Pac. 264]; 6 Ency. of Plead. and Prac. 879.)

For the reasons given, both judgments appealed from are reversed, with directions to overrule the demurrer.

Gray, P. J., and Allen, J., concurred.

[No. 123. Third Appellate District.—August 10, 1905.]

In Re W. T. MITCHELL, on Habeas Corpus.

CRIMINAL LAW—EXPLOSION OF DYNAMITE IN WORKING MINE—“PLACE” —“STRUCTURE”—MEANING OF STATUTE.—A working mine in which men are employed, with its shafts, chutes, tunnels, stopes, excavated chambers, and its stulls to hold up the rock and dirt overhead, is within the act of March 12, 1887, making it a felony to explode dynamite in a “place where human beings usually . . . pass or repass,” with intent to injure or destroy a “structure.”

ID.—CONSTRUCTION OF PENAL STATUTES—COMMON-LAW RULE ABROGATED.—Penal statutes not part of the Penal Code are to be construed by no different rule from that declared in section 4 of the Penal Code, requiring its provisions “to be construed according to the fair import of their terms, with a view to effect its object and promote justice.” That rule was designed to abrogate the old common-law rule that “penal statutes must be construed strictly.”

ID.—SUFFICIENCY OF EVIDENCE—PRELIMINARY EXAMINATION.—Where the evidence produced at the trial was amply sufficient to convict the defendant of the felony charged, it is not material that the evidence produced at the preliminary examination was not sufficient of itself to warrant a conviction. All that is necessary in order

to hold the defendant to answer is that it shall appear that a public offense has been committed and that there is sufficient cause to believe the defendant guilty thereof.

PETITION for Writ of Habeas Corpus to test validity of a conviction in the Superior Court of Calaveras County.
A. I. McSorley, Judge.

The facts are stated in the opinion of the court.

C. H. Fairall, for Petitioner.

J. P. Snyder, District Attorney, and Solinsky & Wehe, for Respondent.

BUCKLES, J.—The petitioner was held to answer on the following charge: "Did then and there willfully, unlawfully, feloniously and maliciously deposit and explode at, in, under and near a place where human beings usually assemble, frequent, pass and repass, to wit: in the levels, stopes and chutes of the Angels Quartz mine owned by the Angels Quartz Mining Company, a corporation, certain dynamite, hercules powder and explosives, with the intent to injure the said mine and the said structures therein and to injure and intimidate and terrify human beings, and by means of which human beings were endangered."

The charge is made under section 601 of the Penal Code, as amended in 1905, or, it is brought under section 8 of the act of March 12, 1887, (Stats. 1887, p. 110), which sections are identical one with the other, and read as follows: "Any person who maliciously deposits or explodes, or who attempts to explode, at, in, or under, or near any building, vessel, boat, railroad, tramroad, or cable-road or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, dwelling-house or other place where human beings usually inhabit, assemble, frequent, or pass and repass, any dynamite, nitroglycerin, vigorite, giant or hercules powder, gunpowder, or other chemical compound or explosive, with the intent to injure or destroy such building, vessel, boat, or other structure, or with the intent to injure, intimidate, or terrify any human being, or by means of which any human being is injured or endangered, is guilty of a felony, and punishable by imprisonment in the state prison not less than one year."

It is claimed by petitioner that the charge must be brought under section 8 of the act of March 12, 1887, because that act had repealed section 601 of the Penal Code, and, it having been repealed, could not be amended by the attempt made in 1905. This contention is doubtless correct if the repeal was effected as claimed. (See Pol. Code, sec. 330.) If the section was really repealed in 1887, it has not been re-enacted, and the prosecution is under section 8 of the act of 1887. Even though there was no repeal, and the amendment of 1905 is proper, the importance to petitioner, according to his standpoint, to have the prosecution under the act rather than under the code, is readily discernible. He contends that the common-law rule that "penal statutes must be construed strictly" is in force in this state as to all penal enactments which are not a part of the Penal Code, while a different rule prevails as to the provisions of the Penal Code, to wit: "All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." (Pen. Code, sec. 4.) I know of no reason why a penal statute not a part of the code should be construed by any other or different rule than that prescribed for construing the provisions of the code. The rule laid down in section 4 of the Penal Code is a common-sense one, a rule which must be acknowledged as just and proper and which does not operate to improperly deprive any person of his liberty. At the time the code was adopted, this rule was intended to apply to the entire body of criminal law in this state, and it was manifestly the intention that the old common-law rule of such strictness (applied sometimes without reason or sense) should be abrogated.

It surely would not be within the light of reason or sense to say that two laws of the same nature, operating upon the same class of persons or things, within the same system of jurisprudence, should have two distinct rules for their construction and interpretation, and that, too, simply because the legislature may see fit to make one enactment a part of the Penal Code and the other an act outside of the code. There can be but one rule for the construing of penal enactments in this state, and that is the universal one laid down by section 4 of the Penal Code. I shall view this proceeding as having been brought under the provisions of section 8 of the act of 1887.

How is it possible, after a careful reading of the section referred to, to come to any other conclusion than that when the legislature has pronounced against the malicious explosion of dynamite and other enumerated explosives (with intent to injure property and person) "at, in, under or near any building, vessel, boat, railroad, tramroad, or cable-road, or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, dwelling-house, *or other* place where human beings usually inhabit, assemble, frequent, or pass or repass," it was the clear intent to prohibit such use of dynamite and the other explosives at, and in every and all places whatsoever? Such construction is warranted by the very terms of the section, and will admit of no other rational construction, and any other construction would not be according to the fair import of the terms used and could not be with a view to effect the true object of the law nor in the line of promoting justice. But the petitioner contends that the language "with the intent to injure or destroy such building, vessel, boat, or other structure" must apply only to the things specifically enumerated, and that "other structure" includes nothing more than "railroad, tramroad, or cable-road, or any train or car, or any depot, stable, carhouse, theater, schoolhouse, church, or dwelling-house."

But this construction cannot be. For the purpose of illustration, suppose one maliciously explodes dynamite on or under a private foot-bridge, constructed and built over a ravine where "human beings pass and repass," with intent to destroy the bridge or injure or intimidate persons. Private foot-bridge not being enumerated in the list of places such as "building, vessel, boat," etc., can it be said that "other places where human beings pass and repass" would not include a private foot-bridge? The object of the statute is to prevent the injury to property and person and the intimidation of human beings by the malicious explosion of dynamite, etc., and, to my mind, there is no question but that "private foot-bridge" would be included in the term "other place where human beings pass and repass." Such foot-bridge would undoubtedly be a structure, and would come within the term "other structure" used in the statute.

That a working mine constructed as the Angels quartz mine is shown to be, with its shafts, chutes, tunnels, levels, stopes,

excavated chambers, and stulls to hold up the rock and dirt overhead, is a *structure* in the common-sense view of the term seems to me to admit of no doubt. *It is a structure*, and meets every requirement of the letter and spirit of the statute. To say that a man may do the things to wreck a mine that defendant is charged with doing and be able to escape responsibility therefor under the law reading as said section 8 reads, simply because it does not mention the word "mine," would be, to say the least, using a rule of construction not warranted even by the common-law rule which petitioner invokes. The act here sought to be punished surely comes within the reason and spirit, as well as the mischief the law was intended to remedy,—to wit, the malicious explosion of dynamite and other enumerated explosives, with intent to injure property and human beings.

It is next claimed there is no evidence connecting the petitioner with the commission of the offense, except that of the witness Holmes, who is shown by his own admissions to be a co-conspirator and an accomplice. There is evidence in abundance to show a well-directed effort on the part of some one to wreck the mine, to prevent its being worked, or to make it more difficult to work and to increase the expense of working, by blowing up the foot-walls, blasting the timbers which held up the rock and dirt of the hanging-wall, and thus allowing the rock and dirt to run in on the stopes and fill them and cave them in, and make the levels of the mine very dangerous for men to work therein by reason of the supports, the stulls, being blown out from the roof of the chutes and levels, and that the wrecking began in the lower levels of the mine. The evidence also shows that the men then working in the mine were removed to other parts of the mine while the malicious blasting was being done, from which it would appear that those doing this work did not intend to injure the men then working in the mine. But the motive of the persons engaged in the wrecking seemed to be to make it disagreeable and dangerous for the men who should take the places of the wreckers, for they knew they were to be discharged or work under a new boss. There was a large force of men at work in the mine. The petitioner was the boss, with power to move the men from place to place in the mine, and just before a certain place was wrecked the men were moved to some other

place, with only the petitioner to direct them; and Holmes was the man in charge of the blasting-powder and subject only to the direction of petitioner as to its use. The circumstances under which the wrecking of the mine was accomplished are shown by other witnesses than Holmes to be such that it was next to impossible for the work of destruction to have been done by another without the knowledge, yes, and the direction of the petitioner. The evidence of the witnesses N. Jakuliza, A. Prothero, J. W. Ling, Martinovich, Arnold Adams, and Thomas Fulton, taken together, tends in a strong degree to identify the petitioner as one of the guilty parties and tends to connect him with the commission of the offense. The evidence produced upon the preliminary examination, independent of that given by the accomplice Holmes, would probably not be sufficient to show beyond a reasonable doubt the guilt of petitioner, but, in order to hold the defendant and to put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction. All that is required is, that there be sufficient legal evidence to make it appear that "a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof."

There was then sufficient evidence to warrant the justice in holding the petitioner and committing him for trial.

The petitioner is remanded.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 71. Second Appellate District.—August 11, 1905.]

C. W. FRENCH, Respondent, v. PACIFIC ELECTRIC
RAILWAY COMPANY, Appellant.

NEGLIGENCE—INJURY TO PASSENGER WHILE ALIGHTING FROM STREET-CAR
—ISSUE—INSTRUCTIONS—BURDEN OF PROOF.—In an action for injuries sustained by being thrown to the ground while alighting from a street-car, where the sole issue was as to whether the car started while the plaintiff was alighting, or whether he voluntarily alighted while the car was in motion, and instructions were fully given upon the subject of contributory negligence urged by the de-

defendant, an instruction that the burden of proof is upon the plaintiff to show that the injury was caused by the act of the carrier in operating the instrumentalities employed in its business, and that if this be shown by a fair preponderance of all the evidence, then there is a presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part, was proper, and did not take the issue from the jury or mislead them as to the issue.

ID.—REFUSAL OF DEFENDANT'S REQUEST—MISLEADING INSTRUCTION.—

There was no error of which the defendant can complain in refusing a requested instruction, that in a case of this character the burden of proving negligence rests upon the plaintiff, and that he must prove the negligence by a preponderance of evidence, as it might naturally be understood by the jury as contradicting the instruction given upon the burden of proof, and would serve to mislead the jury.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Bicknell, Gibson & Trask, Dunn & Crutcher, Norman S. Sterry, and Edward F. Bacon, for Appellant.

The instruction given was misleading. It did not give the proper limitation of the doctrine of imputable negligence, or presumption of negligence from injury, which rests upon the doctrine of probabilities. (*Harrison v. Sutter-Street Ry. Co.*, 134 Cal. 549-552, 66 Pac. 787; *Dressler v. Citizens' St. Ry. Co.*, 19 Ind. App. 383, 47 N. E. 651; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244, 25 Atl. 104; *Denver etc. Ry. Co. v. Fotheringham*, 11 Colo. App. 410, 68 Pac. 978; *Chicago St. Ry. Co. v. Catline*, 70 Ill. App. 97; *Pennsylvania Ry. Co. v. MacKinney*, (Pa.) 17 Atl. 14.) The burden of proof upon the plaintiff does not shift. (*Lincoln Traction Co. v. Webb*, (Neb.) 102 N. W. 258; *United Electric Light etc. Co. v. State*, (Md.) 60 Atl. 248; *Blake v. Camden Interstate Ry. Co.*, (W. Va.) 50 S. E. 408; *Gardner v. Detroit St. Ry. Co.*, 99 Mich. 182, 58 N. W. 49-51; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 345, 73 Pac. 164; *Patterson v. San Francisco etc. Ry. Co.*, 147 Cal. 178, 81 Pac. 531.) The court erred in refusing the instruction requested by defendant. (*Pryor v. Metropolitan St. Ry. Co.*,

85 Mo. App. 367; *Cincinnati etc. Ry. Co. v. McClain*, 148 Ind. 188, 44 N. E. 306, 308; and cases last before cited; Code Civ. Proc., sec. 2061, subd. 4.)

John W. Kemp, for Respondent.

The instruction given stated a correct rule of law. (*McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 561, 55 Pac. 324, and cases cited; *Harrison v. Sutter-Street Ry. Co.*, 134 Cal. 549, 66 Pac. 787; *Judson v. Giant Powder Co.*, 107 Cal. 545, 48 Am. St. Rep. 146, 40 Pac. 1020; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173, 177, 178, 60 Pac. 780; *Osgood v. Los Angeles etc. Co.*, 137 Cal. 280, 283, 94 Am. St. Rep. 171, 70 Pac. 169; *MacDougall v. Central R. R. Co.*, 63 Cal. 432; *Raub v. Los Angeles Terminal Ry. Co.*, 103 Cal. 473, 37 Pac. 374; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164.) No injury could have resulted from the failure to give defendant's requested instruction.

SMITH, J.—This is a suit for damages alleged to have been suffered by the plaintiff from injuries caused by his being thrown to the ground while alighting from one of defendant's cars. There was evidence on the part of the plaintiff tending to show that while alighting from the car, after it had stopped, the car was suddenly started forward, and that he was thereby thrown violently to the street. On behalf of defendant, there was evidence tending to prove that plaintiff alighted while the car was in motion.

The court instructed the jury (among other instructions) as follows:

"You are instructed that the burden of proof is upon the plaintiff to show that the injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business. If this be shown by a fair preponderance of all the evidence, then there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence upon his part."

And the following instruction, asked for by the defendant, was refused:

"The court instructs the jury that the plaintiff in this action seeks to recover damages sustained by reason of in-

juries to him, on account of the alleged negligence of the defendant, its agents and employees, and you are instructed that in a case of this character the burden of proving negligence rests upon the plaintiff, and he must prove the negligence alleged in the complaint by a preponderance of evidence."

The case was tried by a jury, and verdict was for the plaintiff. The appeal is from the judgment entered on the verdict and from an order denying the defendant's motion for a new trial.

The sole errors complained of are the giving of the former and the refusal of the latter of the instructions quoted.

As to the instruction given, it is urged by the appellant, and is not denied, "that there was but one issue in the case, viz.: Was the car started while the plaintiff was alighting therefrom, as he claimed, or did he voluntarily alight therefrom while it was in motion, as the defendant claimed?"

The objection urged by the appellant to the instruction is in effect that it took this issue from the jury. But this is obviously not the case. If the plaintiff was injured by alighting from the car, while it was in motion, or if there was any contributory negligence of any kind proven, then the injury was not caused "by the act of the carrier in operating the instrumentalities employed in its business"; and the instruction could have no application. Accordingly, the jury were explicitly instructed, in effect, that a passenger who voluntarily alights from a car when in motion assumes the risks thereof, and cannot recover for any injuries sustained thereby, and that if the jury believe from the evidence that the plaintiff alighted from the car while in motion, and was thereby injured, then he was guilty of such negligence as to preclude a recovery; and there were other explicit instructions to the same effect. The jury, therefore, could not have been misled as to the issues submitted to them. Nor, as the law is established in this state, do we think any objection can be urged to the instruction. (*McCurrie v. Southern Pacific Co.*, 122 Cal. 558, [55 Pac. 324], and cases cited; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173, [60 Pac. 780]; *Harrison v. Sutter-Street Ry. Co.*, 134 Cal. 549, [66 Pac. 787]; *Osgood v. Los Angeles etc. Co.*, 137 Cal. 280, [94 Am. St. Rep. 171, 70 Pac. 169].) It is unnecessary, therefore, to examine criti-

cally the cases cited from other states. But it may be observed that the instruction involved in *Chicago Street Ry. Co. v. Catline*, 70 Ill. App. 97, was essentially different from the one given in this case, and that under the authorities cited, the decision in *Denver etc. Ry. Co. v. Fotheringham*, 11 Colo. App. 410, [68 Pac. 978], cannot be regarded as law in this state.

As to the instruction refused, we see no error; or, at least, no error of which the appellant can complain. There was, as claimed by the appellant, but one issue in the case, and on this issue the jury were fully instructed by the instructions given at the request of defendant already referred to. To have given the instruction asked for would, therefore, have served only to confuse the jury as to the only issue before them. The case of *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 345, [73 Pac. 164], and the case of *Patterson v. San Francisco etc. Electric Ry. Co.*, 147 Cal. 178, [81 Pac. 531], have no application. It may be admitted that, had the instruction been given, it might (in view of the ambiguous nature of the term "burden of proving") have been so construed as not to be in conflict with the instruction given. (*Scott v. Wood*, 81 Cal. 398, [22 Pac. 871].) But in its most natural construction, and in the construction that would most probably have been given to it by the jury, it would be contradictory; and, as there was but the one issue before the jury, it could have but served to mislead them.

The judgment and order appealed from are affirmed.

Gray, P. J., and Allen, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on October 6, 1905.

[No. 128. First Appellate District.—August 12, 1905.]

MARGARET McKENZIE, Respondent, v. BOARD OF EDUCATION, etc., et al., Appellants.

CERTIORARI—LIMITATIONS OF WRIT.—The writ of *certiorari* only goes to the question of jurisdiction or authority of an inferior tribunal, board, or officer exercising judicial functions where there is no other adequate remedy. It is not a writ of error, nor can it be used to determine the sufficiency of evidence to sustain a decision complained of if made within the limits of jurisdiction.

SCHOOL LAW—SAN FRANCISCO CHARTER—POWER OF BOARD OF EDUCATION TO DETERMINE CHARGES AGAINST TEACHER.—The board of education of the city and county of San Francisco has power to hear and determine charges made in writing by citizens against a teacher employed by the board, notwithstanding the provision in the charter that the superintendent must prefer charges after investigation. The charter is controlled by the general school law in so far as they are inconsistent; but the general power given by the charter to the board of education to investigate charges is in harmony with the school law, and is broad enough to include any charges for which a teacher may be removed.

LD.—SUPERINTENDENT A COUNTY OFFICER—DUTIES NOT FIXED BY CHARTER.—The superintendent of schools of the city and county of San Francisco is a county officer whose duties are prescribed by section 1543 of the Political Code, and the charter of the city and county cannot impose duties upon him as such county officer.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney, for Appellants.

S. V. Costello, and Campbell, Metson & Campbell, for Respondent.

COOPER, J.—This was an application by respondent as petitioner to the superior court for a writ of *certiorari*, for the purpose of vacating and annulling an order or resolution made by defendants in their official capacity as the board of education of the city and county of San Francisco, dismissing the petitioner from her position as teacher in the school

department of the public schools of said city and county. The appellants, having made a return to the writ setting forth the proceedings in full, the court, upon motion of petitioner, made an order granting the writ as prayed, and judgment was accordingly entered. This appeal is from the judgment.

The writ of *certiorari* will only be granted when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy. It cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. It is not a writ of error. Its purpose is not to consider errors or irregularities committed in the exercise of an admitted jurisdiction, nor to correct mistakes of law in conducting a proceeding of which the inferior tribunal, board, or officer had jurisdiction. Nor can it be used for the purpose of determining whether or not the evidence was sufficient to support the particular order, resolution or matter complained of, provided the law and the machinery employed were such as to give the inferior tribunal jurisdiction.

In this case the defendants as a board of education heard and determined charges against the petitioner in regard to her unfitness to teach. They had jurisdiction to hear and determine said charges if properly made (Pol. Code, secs. 1791, 1793; *Kennedy v. Board of Education*, 82 Cal. 490, [22 Pac. 1042].) This is not controverted by respondent, but it is claimed that the board of education never acquired jurisdiction because the method provided by the charter of the city and county of San Francisco as to making the charges is the only method provided and the source of the power of the board to act, and that the charges were not made as provided by the charter. If the charter of the city and county of San Francisco were the only law upon the question, there would be much force in respondent's contention. The legislature, under the constitution, has provided a general system in regard to the common schools, and prescribed the duties of boards of education in counties and cities and counties of the state. The general laws passed by the legislature are paramount, and in case any provision of the charter of any city

conflicts with the general laws as to matters pertaining to the public schools, the charter must give way to the general law. But the charter of a city or city and county may make additional provisions, or provide for matters not enumerated in the general law, provided such provisions are not in conflict with the general law. (*Kennedy v. Miller*, 97 Cal. 434, [32 Pac. 558].) It is the duty of the court in all cases to consider the different provisions of the charter of a city or city and county and the general law, so as to make them harmonize, if possible, and give effect to each if it can be done. We find no difficulty in this case in so harmonizing them, and holding that the board of education had jurisdiction upon the written charges made by citizens.

The laws of the state provide that boards of education may dismiss teachers for insubordination, immoral or unprofessional conduct, profanity, or evident unfitness to teach. (Pol. Code, secs. 1791, 1793.) The charter of the city and county of San Francisco provides (art. VII, chap. 3, secs. 1-5): "In addition to the powers conferred by the general laws of the state, the board of education shall have power . . . to promote, transfer and dismiss teachers; but no teacher in the department at the time of the adoption of this charter, or who shall be hereafter appointed, shall be dismissed by the department except for insubordination, immoral or unprofessional conduct, or evident unfitness for teaching. . . . Nothing in this section shall be construed to prevent the board from removing teachers holding only special certificates or serving a probationary term. Charges against teachers must be formally made by the superintendent after due investigation, and shall be finally passed upon by the board after giving the accused teacher due hearing. . . . To investigate charges against any person connected with or in the employ of the school department, and to take testimony in such investigations."

While the above-quoted provisions attempt to make it the duty of the superintendent to make formal charges against teachers, they do not make it essential that the board of education investigate *only* in cases where the superintendent makes the charges. The board is not prohibited from acting in cases where no formal charges are made by the superintendent. On the other hand, it is expressly stated that these

powers conferred on the board of education are "in addition to the powers conferred by the general laws of the state." And after the use of the clause attempting to make it the duty of the superintendent to make formal charges, in subdivision 5 of section 1 of the chapter of the charter pertaining to the matter, the board is given power "To investigate charges against any person connected with or in the employ of the school department, and to take testimony in such investigations."

This does not confine the board to charges made by the superintendent, but is broad enough to include any charges for which a teacher may be removed.

The superintendent might decline to make the formal charges, but that does not deprive the board of the power of investigating charges made by some one else. Such was not the intent of the framers of the charter. If such were the law it might, in many cases, leave the board powerless to remove a teacher for immorality, intemperance, or any other cause. The superintendent might, through favoritism or corrupt influences, refuse to make any formal charges, and, according to petitioner's contention, the board would be powerless. Not only this, but the superintendent of schools is a county officer. The charter of the city cannot impose duties upon him as such county officer. His duties are prescribed by section 1543 of the Political Code, and we look in vain in that section for any language making it his duty to prefer charges against teachers. Counsel for petitioner claims that the duty is included in the words "To superintend the schools of the county." To superintend the schools does not mean "to make charges against teachers" any more than it could be held to mean that the superintendent should prosecute all teachers or pupils in his county for violation of the criminal laws.

As our conclusion is that the board of education did not exceed its jurisdiction, this inquiry need go no further.

The judgment is reversed, and the trial court directed to dismiss the petition.

Harrison, P. J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 11, 1905, and a peti-

tion to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on October 11, 1905.

[No. 19. First Appellate District.—August 12, 1905.]

MARGARET MCKENZIE, Appellant, v. BOARD OF EDUCATION, etc., et al., Respondents.

MANDAMUS—RESTORATION OF DISMISSED TEACHER—INVESTIGATION OF CHARGES—CASE AFFIRMED.—A writ of mandate will not lie to compel the restoration of a teacher dismissed upon written charges made by citizens after investigation thereof by the board of education without charges preferred by the county superintendent of schools. (*The case of McKenzie v. Board of Education etc. et al., ante*, p. 406, applied and affirmed.)

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

S. V. Costello, and Campbell, Metson & Campbell, for Appellant.

Percy V. Long, City Attorney, for Respondents.

COOPER, J.—This is an application by petitioner for a writ of mandate against respondents as the board of education of the city and county of San Francisco, to compel said board to restore her to her position as teacher in the public schools of said city and county. The trial court denied the petition, and judgment was accordingly entered in favor of respondents. From the judgment petitioner prosecutes this appeal.

The contention of appellant is, that the board of education had no jurisdiction in the matter of hearing testimony, for the reason that no formal charges had been presented against her by the county superintendent. This contention has been disposed of against appellant in the case of *Margaret McKenzie v. Board of Education of the City and County of*

San Francisco, (No. 128), *ante*, p. 406, this day decided, and for the reasons therein stated the judgment in this case is affirmed.

Harrison, P. J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 11, 1905, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on October 11, 1905.

[Crim. No. 14. Second Appellate District.—August 12, 1905.]

THE PEOPLE, Respondent, v. JAMES COWAN, Appellant.

CRIMINAL LAW—REMARK BY JUDGE—ERROR WITHOUT PREJUDICE.—In a criminal prosecution an improper statement made by the judge during the course of the trial in the presence and hearing of the jury, as to the effect of certain evidence, which could only have been favorable to the defendant's theory of the case, is without prejudice.

ID.—CROSS-EXAMINATION—FRATERNAL RELATION.—It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility.

ID.—MURDER AND MANSLAUGHTER—CONSPIRACY—INSTRUCTIONS.—In a prosecution for murder, where the evidence showed that the defendant was one of several conspirators who were prepared to go to any extent to carry out their unlawful design, and had so agreed, and that the deceased was killed during the carrying out of such design, it is proper to charge the jury in effect that if such a conspiracy existed, and the same was established beyond a reasonable doubt, and that the deceased was killed by a shot fired in furtherance of the unlawful design, they should find the defendant guilty, notwithstanding they might have a reasonable doubt as to whether the defendant actually fired the fatal shot.

APPEAL from an order of the Superior Court of Kern County and from an order refusing a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Matthew S. Platz, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

ALLEN, J.—Defendant was by information accused of murder, and was convicted of manslaughter; and from the judgment and order denying a new trial he prosecutes this appeal.

The record discloses that defendant and a number of others conspired together to commit an unlawful act, by taking forcibly from a jail the deceased, who was a prisoner therein, and applying to his person a coat of tar and feathers. After such a conspiracy was formed, the defendant armed himself with a gun and joined his co-conspirators at the jail, where the same was broken open and the prisoner rushed therefrom into the crowd of conspirators on the outside. Shortly after he emerged from the building, and when the deceased was but a few feet therefrom, a shot was fired by the defendant at him, and almost immediately thereafter he was grappled by another one of the crowd, and while engaged in a scuffle with the party who had seized hold of him, another shot was fired and the deceased thereupon sank to the ground, or was thrown down by his assailant, his clothing torn from his body, and crude oil and feathers applied. The deceased was then carried back to the jail building and the crowd separated. It is evident from the character of the injury inflicted by the fatal shot that the deceased was dying, if not already dead, when the oil and feathers were applied. The testimony is convincing that defendant actually fired the first shot, and there was ample testimony to justify the jury in determining that he fired the second shot as well. Strange as it may seem, it appears affirmatively from the record that none of the participants were punished, or any attempt made in that direction by the authorities, except this proceeding against defendant, in which case the jury satisfied its conscience by a verdict of manslaughter.

Notwithstanding the brutal character of the crime, and the undoubted guilt of the defendant, he, nevertheless, on this

appeal insists that the judgment should be reversed upon purely technical grounds. Chief among these is, that the court erred in expressing an opinion as to the weight of evidence in the presence and hearing of the jury. This statement was induced by reason of expert testimony to the effect that it was not possible for deceased, owing to the character of the wounds, to have taken a step after being shot, that paralysis must have necessarily ensued immediately. The statement of the court was in effect that it was evident that he was not paralyzed when he was running, nor when he was scuffling with his assailant. If there was any error or impropriety in such statement, it was in support of defendant's theory, who was seeking to establish that, while he did fire the first shot, some one else fired the second. The effect of this statement of the court could only have been favorable to defendant's theory, and he should not be heard to complain.

The next objection is, that the action of the trial court in permitting the district attorney to interrogate a witness as to his membership in the same miners' union of which defendant was a member was error. This was perfectly competent. It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility. For the purpose of fully weighing the evidence of any witness, the jury are entitled to know his bias or feelings in the case, if any there be. (*People v. Wong Chuey*, 117 Cal. 626, [49 Pac. 833].) It is elementary that the state of mind of a witness as to his friendship or hostility towards the parties is proper matter for investigation. (*People v. Thomson*, 92 Cal. 509, [28 Pac. 589].)

It is insisted further that the court erred in certain of its charges to the jury. The crime charged was murder. There was evidence received and circumstances shown to exist warranting the conclusion that the conspirators were prepared to go to any extent to carry out their unlawful design, and had so agreed. That a mob formed to commit an outrage upon a defenseless prisoner is found to be armed with deadly weapons is a strong circumstance tending to show that their determination and understanding was that, if need be, deadly weapons would be used to effectuate their design. Under

these circumstances, it was entirely proper to charge the jury that, if such a conspiracy existed, and to the extent last above stated, "and the same was established beyond a reasonable doubt, that even should you still have a reasonable doubt in your minds as to whether defendant actually fired the shot that killed the deceased, and still you believe beyond a reasonable doubt he fired a shot feloniously at the deceased, and about the same time, or shortly afterwards, another shot was feloniously and with malice aforethought fired at the deceased, which caused his death, and that said shot was fired feloniously in furtherance of the unlawful design and conspiracy so entered into by defendant and the other person or persons, that under such circumstances it will be the duty of the jury to find the defendant guilty, and then to determine from the evidence and instructions of the court whether it is murder in the first degree, murder in the second degree, or manslaughter." We perceive no error in this, or in any of the instructions given by the court. (*People v. Holmes*, 118 Cal. 456, [50 Pac. 675].)

There was no error in refusing a new trial, the application for which was based upon the ground of newly discovered evidence, where it appears that such newly discovered evidence is cumulative only in its character.

Judgment and order affirmed.

Gray, P. J., and Smith, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on October 6, 1905.

[Crim. No. 1. Second Appellate District.—August 15, 1905.]

THE PEOPLE, Respondent, v. ARCHIE HILL, Appellant.

CRIMINAL LAW—APPEAL—ARREST OF JUDGMENT—VERDICT.—In a criminal prosecution an appeal does not lie from a motion in arrest of judgment nor from the verdict.

Id.—MURDER—CONFLICTING EVIDENCE.—In a prosecution for murder, where the evidence is conflicting as to whether the crime committed

was manslaughter or murder in the first degree, a verdict convicting the defendant of the latter offense will not be disturbed on appeal on the ground of the insufficiency of the evidence to sustain it.

ID.—ADMISSIONS—INSTRUCTIONS.—In such a prosecution, where oral admissions of the defendant made to the officers soon after his arrest, had been placed in evidence through the testimony of the officers, it was not error to instruct the jury "that the evidence of certain witnesses as to oral admissions or statements of the defendant alleged to have been made to them should be received with great caution and viewed with scrutiny, and that in considering such testimony you should take into consideration the surrounding circumstances and surroundings of defendant and the probability or improbability of his having made such statements." Such instruction, even if erroneous, was favorable to the defendant.

ID.—WEIGHT OF DEFENDANT'S EVIDENCE.—It was not error to instruct the jury in such prosecution as follows: "In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements taken in connection with all the evidence in the case, and if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And in judging of the defendant who has testified before you you are in duty bound to presume that he has spoken the truth. Unless that presumption has been legally repelled, his evidence is entitled to full credit."

ID.—INSTRUCTIONS NEED NOT BE REPEATED.—An instruction requested by the defendant as to the law of self-defense need not be given if it has already been given in substance.

ID.—TESTIMONY OF DEFENDANT.—It was not error to refuse an instruction requested by the defendant as follows: "The object of the law in permitting parties charged with crime to testify in their own behalf is not merely to enable them to disclose facts wholly within their own knowledge, but to explain their own acts and motives with which they were performed and to explain, if need be, what they meant or intended to be understood as meaning by what they may have said or done at the time of the alleged criminal occurrence."

ID.—EVIDENCE.—In a prosecution for the murder of a street-car conductor, in which it was shown that the killing was the culmination of a dispute between the defendant and the conductor as to whether the defendant had on a previous trip, by mistake, given the conductor a five-dollar gold-piece instead of a nickel, evidence is admissible that the conductor when taken to the hospital had not a five-dollar piece on his person.

ID.—CONFLICTING STATEMENTS OF DEFENDANT.—In such a case evidence is admissible of conflicting statements of the defendant as to the time when he discovered the loss of the five dollars.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

J. G. Rossiter, C. L. Shinn, and H. H. Appel, for Appellant.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

GRAY, P. J.—The defendant was convicted of murder in the first degree, and sentenced to imprisonment for life. He appeals from the judgment, from an order denying him a new trial, from an order denying his motion in arrest of judgment, and from the verdict of the jury.

The appeals from the order denying the motion in arrest of judgment and from the verdict are unauthorized by law, and may therefore be ignored.

The defendant shot and killed Wilbur L. Carlton, a street-car conductor, in the city of Pasadena. The killing was the culmination of a dispute between defendant and the conductor as to whether defendant had, on a previous trip, by mistake, given the conductor a five-dollar piece, thinking it was a nickel.

1. The appellant contends that the evidence, taking the worst view of it for defendant, establishes no greater crime than that of manslaughter. The evidence was very conflicting. The testimony of one set of eye-witnesses to the controversy and shooting showed that the defendant shot the conductor without any previous hostile demonstrations or threats on the part of the latter, and because the latter denied receiving the five dollars and refused to restore it to defendant. Another set of witnesses testified to facts showing that the conductor violently beat the defendant in the face and on the head and pushed him off the rapidly moving car, and that defendant shot only after the beating had progressed for some time, and just as the defendant was losing his hold on the car—perhaps accidentally. What theory should be adopted from this evidence, and what witnesses should be believed, was for the jury to determine. We cannot interfere with

the verdict where there is, as in this case, a substantial conflict in the evidence, one line of it pointing clearly to guilt of the crime of which the defendant stands convicted, and the other line pointing to a lesser crime, or, perhaps, to justification on the ground of self-defense. Of course, on the theory of the truth of the witnesses who testified to the absence of hostile threats and demonstrations on the part of the conductor prior to the shooting, the defendant was guilty of murder in the first degree. However sincerely defendant may have believed that the conductor had four dollars and ninety cents of defendant's money, yet, for the latter to shoot the former because of his refusal to surrender this money shows an "abandoned and malignant heart"; and constitutes murder in the first degree.

2. The following instruction is complained of:

"You are instructed that the evidence of certain witnesses as to oral admissions or statements of defendant alleged to have been made to them, should be received with (great) caution and viewed with scrutiny, and that in considering such testimony you should take into consideration the surrounding circumstances and surroundings of defendant and the probability or improbability of his having made such statements."

Certain oral admissions of defendant, made to the officers soon after his arrest, had been placed in evidence, through the testimony of the officers. This instruction must be understood as applying to those admissions; and thus understood, we cannot see how it can be regarded otherwise than as favorable to defendant. If it were conceded to be erroneous, it could not have harmed the defendant. And this would be so, even if it were directed at some statement that the defendant had previously made, and upon which he relied at the trial to aid his defense. (*People v. Wardrip*, 141 Cal. 232, [74 Pac. 744].)

3. The jury were instructed as follows:

"In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements taken in connection with all the evidence in the case, and if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject it. But this does not mean that you have a right to arbitrarily reject it.

"And in judging of the defendant who has testified before you you are in duty bound to presume that he has spoken the truth and unless that presumption has been legally repelled his evidence is entitled to full credit."

The appellant complains of this instruction, but there is no merit in such complaint. (*People v. Wells*, 145 Cal. 138, [78 Pac. 470].) The language, "if convincing and carrying with it a belief in its truth, act upon it," is found in the instruction in the Cronin case (34 Cal. 196), and that case has been often affirmed upon this point.

4. The instructions given as to the law of self-defense were aptly applied by the court to the facts in the case, were full and complete, and there was, therefore, no necessity for giving the further instructions on that point requested by defendant.

5. The court refused to instruct the jury as follows:

"The object of the law in permitting parties charged with crime to testify in their own behalf is not merely to enable them to disclose facts wholly within their own knowledge, but to explain their own acts and motives with which they were performed and to explain, if need be, what they meant or intended to be understood as meaning by what they may have said or done at the time of the alleged criminal occurrence."

There is nothing in this proposed instruction that would enlighten any person of ordinary intelligence, and nothing in it necessary to be stated to a jury. The court made no mistake in refusing it.

6. Further objections are made to the giving of certain instructions, and to the refusal to give certain others. We have carefully examined the same, and are of opinion that none of them are of sufficient importance to warrant a discussion. The instructions given were full and fair upon every point involved in the case, and were pertinent to the case as made by the evidence, and this was sufficient.

7. Complaint is made that the prosecution was permitted to prove that the conductor when taken to the hospital had not a five-dollar piece on his person. It is urged now that the material thing was not whether the defendant did in fact give the five-dollar piece to the conductor, but the important fact to ascertain as bearing on his motives is whether he

thought he had delivered it. We take it that if it could be demonstrated that the defendant had not in fact delivered any five-dollar piece to the conductor, and it was also shown (as some evidence indicated) that in his first account of the matter he had made statements in conflict with his testimony given at the trial as to the time when he first discovered that he had parted with the five-dollar piece, all this would tend to show that the defendant was acting in bad faith as to his five-dollar claim. We think it was proper to show that the conductor was not possessed of a five-dollar piece, because that fact, taken with the other evidence, tended to show that he had not received a five-dollar piece from defendant. And his non-receipt of the piece, taken with the other evidence, tended to show that defendant's claim as to the five-dollar piece was not in good faith. In this connection, we should not overlook the fact that the defendant was armed with a deadly weapon. Surely the defendant was in a better position than any other person to know whether he had lost a five-dollar piece, and if he claimed to have given it to a person to whom he knew he did not give it, this might justify the argument that he was hunting for trouble of a nature that would bring into use the deadly weapon with which he went armed.

8. There was no error in permitting the evidence to stand which tended to show conflicting statements of defendant as to the time when he discovered the loss of his five dollars.

We can discover no error in the record.

The judgment and order denying a new trial are affirmed.

Allen, J., and Smith, J., concurred.

[Crim. No. 10. Second Appellate District.—August 15, 1905.]

THE PEOPLE, Respondent, v. BEN F. TURNER, Appellant.

CRIMINAL LAW—EVIDENCE—IMPEACHMENT OF WITNESS.—The impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony; and to permit the introduction of such testimony is prejudicial to the party against whom it is received. Particularly is this the rule where there is nothing to show that the witness did not have the same motive or interest to deceive when he made the confirmatory statement that he may have had when he testified to the fact.

ID.—HEARSAY.—In a prosecution for larceny a witness cannot testify to a conversation had with a third person, the effect of which was to convey the impression that such third person had told the witness that the defendant was one of the parties engaged in the stealing. Such testimony is hearsay.

ID.—ACCUSATION IN PRESENCE OF DEFENDANT.—In such prosecution evidence of a statement made by the prosecuting witness in the presence of the defendant, that the defendant was one of the persons concerned in the stealing, is inadmissible if the defendant at the time denied the charge.

APPEAL from a judgment of the Superior Court of Kern County and from an order refusing a new trial. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

Emmons & Irwin, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and J. W. P. Laird, District Attorney, for Respondent.

GRAY, P. J.—The defendant stands convicted of the larceny of fifty dollars from the person of one Smith. The evidence tended to disclose something very much in the nature of a highway robbery. The defendant appeals from the judgment, and from an order denying him a new trial, and

his principal contention is, that the court erred in permitting the prosecution to prove certain hearsay statements identifying defendant as having taken part in the larceny charged. The question arises this way: The conviction of defendant depends almost altogether upon the testimony of the complaining witness Smith, he being the only witness who identified the defendant as assisting in the robbery. To impeach and weaken the force of Smith's testimony in this regard, the defendant called the city marshal of Bakersfield, Ed Tibbet, who testified that about two hours after the alleged larceny Smith had, in substance, declared that he could not identify any of the parties that robbed him. The defense also called a brother of Ed, Bert Tibbet, who testified that in the evening of the same day of the robbery, or larceny, Smith had expressed himself as unable to identify the defendant as being concerned in the robbery. Smith had been intimately acquainted with the defendant for a long time before the robbery. Thereafter, the prosecution was permitted to show on the cross-examination of Bert Tibbet, and by the testimony of James McKamy, a constable, that on the day following the larceny, the complaining witness did state, in their presence, that the defendant was one of the parties who robbed him. The prosecution was also permitted to show by the testimony of McKamy that Smith subsequently stated, in the presence of defendant and to him, that he (the defendant) was one of the persons concerned in the robbery, and that defendant denied it and also denied having been with Smith at the Palace dance hall in the neighborhood of three or four o'clock, just previous to the alleged larceny.

In the foregoing we think the court erred to the prejudice of the defendant. The impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony, and to permit the introduction of testimony of this latter character is prejudicial to the party against whom it is received. (*Mason v. Vestal*, 88 Cal. 396, [22 Am. St. Rep. 310, 26 Pac. 213].) Particularly is this the rule where, as here, there is nothing to show that the witness did not have the same motive or interest to deceive when he made the con-

firmatory statement that he may have had when he testified to the fact. (*People v. Rodley*, 131 Cal. 254, [63 Pac. 351]; *Mason v. Vestal*, 88 Cal. 396, [22 Am. St. Rep. 310, 26 Pac. 213].)

We are of opinion also that it was error to permit the city marshal to testify to any information that he had received from conversation with the barkeeper, Silva, as to "who one of the parties were that had robbed the complaining witness." The answers of the city marshal to the questions asked him by the district attorney were well calculated to leave the impression that Silva had told the marshal that the defendant was one of the parties engaged in the robbery. Of course, this was hearsay and prejudicial to the defendant.

We are also of opinion that the testimony of McKamy to the effect that Smith, soon after the arrest of defendant, stated that "he was one of them, he was the fellow," in the presence of and to the defendant, should have been excluded. The defendant denied this charge of Smith at once. It is not the declaration made in the presence of a defendant that can be taken as evidence against him; it is only his conduct in connection with the declaration that can be looked to for evidence of guilt, and if he flatly denies the charge there can be no evidence in this of guilt, and therefore the whole matter should be excluded, lest the jury may infer from its being admitted that they are warranted in treating it as evidence against the defendant. (*People v. Teshara*, 134 Cal. 544, [66 Pac. 798]; *People v. Philbon*, 138 Cal. 530, [71 Pac. 650].) Of course, where the act constituting the crime is clearly shown and the only question is as to whether the act was done with a criminal intent, the fact that the defendant denies the commission of the alleged criminal act may tend to show criminal intent and consciousness of crime. (*People v. Cole*, 141 Cal. 88, [74 Pac. 547].) Indeed, even where the defendant flatly denies the criminal act, yet if he goes on to make exculpatory statements, for instance, as to his whereabouts at the time, and these statements can be shown to be false, then the statements, together with their falsity, may be shown on the theory that falsehood in the matter is an indication of conscious guilt. In such a case, it is the falsehood only that tells against the defendant.

The district attorney seems to have insisted on the introduction of all the foregoing testimony upon some theory that all these statements having been made by Smith in the presence of the witness Bert Tibbet, they in some way tended to discredit his testimony as to what he claimed to have heard the complaining witness say on the day of the larceny or robbery. But, as we read the record, all these declarations of Smith to the effect that the defendant assisted in the robbery were made on the day he was arrested, being the day after the robbery, and do not tend to contradict or discredit the testimony of Bert Tibbet as to Smith's statements made on the day that he was robbed.

The judgment and order are reversed and the cause remanded for a new trial.

Allen, J., and Smith, J., concurred.

[Crim. No. 15. Second Appellate District.—August 15, 1905.]

THE PEOPLE, Respondent, v. JOSEPH H. TAGGART,
Appellant.

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.—In a criminal prosecution it is error to instruct the jury without qualification that "where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been."

1D.—ERROR WITHOUT PREJUDICE.—The giving of such instruction, although erroneous, will not warrant a reversal where the circumstantial evidence of the defendant's guilt was entirely uncontradicted, and was, if not absolutely conclusive, at least "satisfactory" in the sense of that term as defined in the Code of Civil Procedure,—to wit, such as "ordinarily produces moral certainty or conviction in an unprejudiced mind."

APPEAL from a judgment of the Superior Court of Riverside County and from an order refusing a new trial. J. S. Noyes, Judge.

The facts are stated in the opinion of the court

Byron Waters, and N. A. Bailie, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

SMITH, J.—The defendant was convicted of the crime of grand larceny, and appeals from the judgment, and from an order denying his motion for a new trial.

The only error complained of is the following instruction to the jury: "*Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been.*"

It is said by the appellant's attorneys that this instruction was first given in *People v. Cronin*, 34 Cal. 202, and that it has been approved in some later cases cited by them. But the instruction is taken, not from the instructions in *People v. Cronin*, but from the opinion of the court on page 202; and in looking over the cases citing this case, as given in Palm's Citations, we have not been able to find any in which this instruction was involved, except the cases of *People v. Dole*, 122 Cal. 486, [68 Am. St. Rep. 511, 55 Pac. 581],—where it is held to be erroneous,—and in *People v. Rushing*, 130 Cal. 453, 454, [80 Am. St. Rep. 141, 62 Pac. 742], where it is, in effect, so held. In the former case, indeed, it is said: "The vice of this instruction is generally corrected, as it was in this case, by special instructions to the effect *that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved*"; and in the latter case this forms part of the instruction given. But in the case at bar there is no such qualifying instruction.

It is indeed urged by the attorney for the state that the qualifying instruction referred to in the cases cited "offers but meager support if the main instruction is prejudicial." But in this we do not agree. The vice of the instruction here is not merely that the jury are instructed that in the case of circumstantial evidence they may convict upon evidence less "satisfactory" than in the case of direct evidence (as to which, see Code Civ. Proc., sec. 1835), but also, that if the

"evidence" be inconsistent with any other rational conclusion than the defendant's guilt, it is the duty of the jury to convict. But the law is, that the jury is the sole judge of the credibility of the evidence, and therefore, though the evidence be inconsistent with the theory of the defendant's innocence, yet they may acquit him. This defect is pointed out in the opinion in *People v. Dole*, where it is said: "In cases of circumstantial evidence, *facts* should be proved which are . . . inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which satisfies the minds and consciences of the jury," etc. Or, as elsewhere expressed—to justify the jury in finding the defendant guilty—"the law requires that the *facts* (not merely the *evidence*) . . . be . . . inconsistent with any other rational conclusion." (*People v. Murray*, 41 Cal. 67.) Having regard, therefore, to this vice in the instruction, it can readily be perceived that the error might be cured—as it was in fact cured in the cases cited—"by special instructions to the effect that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved."

In *People v. Eckman*, 72 Cal. 585, [14 Pac. 359], and *People v. Sansome*, 84 Cal. 454, [24 Pac. 143], cited in the briefs, the instruction involved was: That "to convict upon circumstantial evidence, it should be such as to produce nearly the same degree of certainty as that which arises from direct testimony." But this instruction is free from the principal vice to which the instruction now under consideration is obnoxious; the cases are, therefore, not similar.

I have no doubt, therefore, that the instruction is erroneous, and that ordinarily the error would be material. But in the present case the circumstantial evidence of defendant's guilt was, if not absolutely conclusive, at least "*satisfactory*," in the sense of the term as defined by the code—that is to say, it was such as "ordinarily produces moral certainty or conviction in an unprejudiced mind" (Code Civ. Proc., secs. 1826, 1835); and it stood entirely uncontradicted. Assuming, therefore,—as we must,—that the jury was composed of men at once unprejudiced and of average common sense and judgment, we are justified, under the authorities, in believ-

ing—as we do—that the result would not have been different had the instruction been omitted. (Code Civ. Proc., sec. 475; *Green v. Ophir Co.*, 45 Cal. 526, 527; *Estate of Briswalter*, 72 Cal. 110, [13 Pac. 164]; *Estate of Spencer*, 96 Cal. 449, 450, [31 Pac. 453].) The cases cited are indeed civil cases, but we see no reason why the same principle should not apply in criminal cases.

Nor are the provisions of the Code of Civil Procedure cited to be disregarded. They have, indeed, as to certain matters, specifically indicated in the decision, been held unconstitutional (*San Jose Ranch Co. v. San Jose Land etc. Co.*, 126 Cal. 325, [58 Pac. 824]), but the question now before us does not seem to be affected by that decision. For here not only does it not appear that “a different result would have been probable if [the] error . . . had not occurred,” but the contrary; and the improbability of a different result upon the omission of the instruction is so strong as to produce in us an abiding conviction to that effect.

We are of the opinion, therefore,—having regard to the particular case,—that, notwithstanding the error of the court below, the judgment and order should be affirmed; and it is so ordered.

Gray, P. J., and Allen, J., concurred.

[No. 52. Second Appellate District.—August 16, 1905.]

T. DUNLAP, Respondent, v. EUGENE R. PLUMMER,
Appellant, and FRANK O. WAKELEY, Respondents.

CONTRACT—RESCISSION—INCOMPETENT PERSONS.—The contract of a person whose mind was so impaired as to be incapacitated for transacting business, but who was not entirely without understanding, may be rescinded; and such right of rescission includes the defensive right, if the other party seeks by action to enforce the contract, to set up and establish such matters as would justify a decree of rescission.

ID.—INCOMPETENT JOINT MAKER OF NOTE.—A joint maker of a promissory note, which was given for an antecedent debt due from the other maker to the payee, who signed the note in ignorance of

that fact and when he was mentally incapacitated from transacting business, is entitled either to sue for a rescission of the contract or to set up such right to a rescission as a defense to an action on the note brought by an assignee who paid no consideration for the assignment.

ID.—CONTINUANCE—DEPOSITION NOT RETURNED.—It is error to refuse a continuance asked for by the defendant in an action on such note in order to procure the deposition of an absent witness, by whom alone his mental incompetency could be established, if the affidavit for the continuance was sufficient in form and due diligence had been used in the attempt to procure the deposition.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Dunnigan & Dunnigan, for Appellant.

Stephens & Stephens, for Respondent.

ALLEN, J.—Plaintiff declares upon a promissory note executed to one Wright, plaintiff's assignor, by one Wakeley and appellant Plummer. Wakeley suffered default. Plummer answered, alleging that he received no consideration for the note; that the same was given by Wakeley for an antecedent debt due Wright; that appellant signed the same at the request of said Wakeley and said Wright, and in ignorance of the fact that it was to secure a pre-existing debt; that Wakeley was insolvent at the time and Wright knew it; that plaintiff paid no consideration for the assignment to him. And for a further answer alleges that at the time of such signing, and for a long time prior thereto, he was mentally incapacitated for transacting business; that his mind was so impaired that he did not comprehend what he was doing, and did not understand the nature and obligation of the contract or the liability he was incurring. When the case was called for trial appellant moved for a continuance, that he might procure the deposition of an absent witness by whom alone he could establish the mental condition and incompetency set out in his answer. It is conceded that this affidavit was sufficient in form, and that due diligence had been used in an attempt to procure the deposition. The

motion was denied and the case proceeded to trial, and judgment went for plaintiff.

The motion for a new trial being denied, appellant appeals from the judgment and from the order denying such new trial.

The sole question presented, as conceded by counsel, is as to the sufficiency of the answer to constitute a defense to plaintiff's action; for if the answer was sufficient, then appellant was by this action of the court prevented from an opportunity to present evidence in support thereof. We are of opinion that the answer was sufficient. While the contract was only voidable, the appellant not being shown by the answer to be a person entirely without understanding, yet it was a contract which he might have rescinded under the code. That right of rescission is exercised when a party who desires to rescind gives seasonable notice of such intent, and when a consideration has been received returns the same, placing the other party in *statu quo*, thus terminating the contract. He may sue for a rescission and obtain a judgment of court decreeing his release upon such terms as the court may deem just. (*Moore v. Moore*, 56 Cal. 92.) This right also includes the defensive right which authorizes himself the other party seeks by action to enforce the contract, to set up and establish such matters as would justify a decree of rescission, which is the effect of a judgment in defendant's favor upon such an answer as is before us. (*Toby v. Oregon Pacific R. R. Co.*, 98 Cal. 498, [33 Pac. 550]; *Field v. Austin*, 131 Cal. 382, [63 Pac. 692].) The mere fact that a party does not avail himself of the right to rescind or sue, therefore, is not to be taken as barring him from his right of defense when the other party seeks to enforce a contract which is voidable, or where the consideration has wholly failed or failed in part. And where no intervening rights or equities are involved, and where, as in this case, no prejudice could possibly exist by reason of delay, this defensive right is still open. The allegations of the answer are sufficient, if established, to warrant a decree of rescission. They certainly are sufficient as a defense, where the contract is sought to be enforced.

Judgment and order reversed, and cause remanded for a new trial.

Gray, P. J., and Smith, J., concurred.

[No. 74. Second Appellate District.—August 16, 1905.]

EDMUND BOHAN, doing business as the Bohan Paint Company, Respondent, v. THE RECORD PUBLISHING COMPANY, Appellant.

LIBEL PER SE—ACCUSATION OF ARSON.—A publication in a newspaper falsely intimating that the proprietor of a business establishment had set fire to his premises and that the fire officials had decided to arrest him if another fire occurred there is libelous *per se*.

ID.—DAMAGES—INJURY TO BUSINESS.—The sole proprietor of a business conducted by a firm name, who is libeled under his firm name in such a manner as to affect him personally, is not limited to the recovery of such damages as resulted from the injury to his business.

ID.—PRESUMPTION OF DAMAGES.—Damages to a person's reputation, fame, and credit are presumed to result from the publication of a libel *per se*.

ID.—PRESUMPTION OF MALICE.—In an action to recover damages for the publication of a libel *per se* malice is presumed, and, if exemplary damages are not claimed, the fact that the publication was made without any ill-will towards the plaintiff, but in good faith and believing it to be true, cannot be considered in mitigation of damages.

ID.—INSTRUCTIONS—EVIDENCE.—The refusal to give instructions not warranted by any evidence in the record is not error.

APPEAL from an order of the Superior Court of Los Angeles County refusing a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Edwin A. Meserve, and Jeff Paul Chandler, for Appellant.

Hunter & Summerfield, and W. H. Morris, for Respondent.

SMITH, J.—The plaintiff, who was the sole proprietor, owner, and manager of the establishment known as the Bohan Paint Company, sued the defendant for a libel published in its journal, The Los Angeles Record, and recovered a verdict and judgment for the sum of five hundred dollars. The defendant appeals from an order denying its motion for a new trial.

The libel complained of is as follows:

"Another fire will cause their arrest.

"During the last forty days there have been three mysterious fires in the rear of the Bohan Paint Company on Broadway, near Sixth, or in the alley very close thereto. Three times has the fire department responded to alarms in that neighborhood and each time arrived just in time to prevent disastrous fires.

"A month ago policeman Mike Holleran while covering his beat early in the morning noticed flames in the rear of the store occupied by the paint company. When he went into the rear of the place the flames were making rapid headway and he summoned the fire department. There were a number of oil barrels in the rear of the yard, but *the proprietor* of the establishment denied that there was any oil in them.

"However, the fire would have been a disastrous one had not Holleran acted promptly.

"Yesterday afternoon there was another fire in the rear of the paint shop. It burned some time but the department again checked the flames. Many of the boxes and barrels, however, were burned.

"This morning the department was again summoned. A bonfire was burning in the rear yard of a hardwood frame factory next door and the owners of that plant did not know how the fire started. When Captain Lennon arrived he noticed the ashes from another bonfire near the fence in the rear of the paint shop. This fire had undoubtedly burned out during the night.

"In explaining the fire of yesterday afternoon the paint firm says that some oil-soaked sawdust was left in the rear yard and that spontaneous combustion was the result.

"Assistant Chief O'Donnell and Secretary Robert Burns held a long consultation in the matter and it was decided to arrest the *proprietor* of the firm if another fire is discovered in the rear of the place. Chief O'Donnell informed the paint people that they would be compelled to clear up the rear yard at once and remove all inflammable material.

"The paint company's explanation of the fires is not satisfactory."

It is argued by the appellant, among other points: That the above article is not libelous *per se*; that it does not charge

the plaintiff personally with any crime, but refers to the firm of Bohan Paint Company only; and that damages cannot be recovered other than such as might result from injury to the business of the company. But these points are untenable. The publication, we think, is on its face libelous; and it is alleged and proven that it was published of the plaintiff, who was the sole proprietor of the concern known as the Bohan Paint Company. (Code Civ. Proc., sec. 460; *Schomberg v. Walker*, 132 Cal. 224, [64 Pac. 290].) Nor is there any principle upon which his claim for damages should be limited to those affecting his business. (Civ. Code, secs. 3300-3333.) Nor would the case be otherwise had there been more than one proprietor of the firm. In such case the firm could not have recovered damages other than such as might have been sustained by them in their common business; but if the libel were of a character to affect them personally, each of the firm could maintain his personal action. (*Schomberg v. Walker*, 132 Cal. 224, [64 Pac. 290].)

It is also objected that the court erred in refusing to give certain instructions of the appellant. But these, we think, were rightly refused. The first is to the effect that if the jury should find from the evidence that the plaintiff had not suffered any damage to his reputation, fame and credit, then, notwithstanding the proof of the libel and the failure of the defendant to justify, the jury should find for the defendant; which is opposed to the principle that damages must in such case be presumed. The second is to the effect that if the jury should find from the evidence that the article was published by the defendant without any ill-will toward the plaintiff, but in good faith and believing it was true, they should consider these matters in mitigation of damages. But in the case of publication libelous *per se*, ill-will or malice is to be presumed, and in this case the ill-will of the defendant appears clearly upon the face of the publication. Nor do we perceive any principle upon which—in a case where exemplary damages are not claimed—evidence of this character can be regarded as legitimate.

The third and fourth instructions, the denial of which is complained of, are, in effect, that it was sufficient for the defendant, in justification, to prove so much of the article only as constituted the sting or substance of the charge; but

there is no evidence in the record to justify this instruction. Other errors complained of are sufficiently disposed of by what has been said as to the above.

There are several objections to the admission and exclusion of testimony, but these are of no materiality and do not require further consideration.

The order appealed from is affirmed.

Gray, P. J., and Allen, J., concurred.

[Crim. No. 16. Second Appellate District.—August 16, 1905.]

THE PEOPLE, Respondent, v. HARRY GREEN, Appellant.

CRIMINAL LAW—ASSAULT TO COMMIT RAPE—SIMPLE ASSAULT.—On a prosecution for an assault to commit rape the defendant may be convicted of a simple assault. In the present case the evidence is sufficient to sustain the verdict of simple assault.

Id.—INSTRUCTIONS WITHOUT PREJUDICE.—On such a prosecution, where the defendant was convicted of simple assault, instructions relating only to the higher offense, whether erroneous or otherwise, are without prejudice.

APPEAL from a judgment of the Superior Court of Riverside County and from an order refusing a new trial. J. S. Noyes, Judge.

The facts are stated in the opinion of the court.

Lafayette Gill, for Appellant.

U. S. Webb, Attorney-General, C. N. Post, Assistant Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

GRAY, P. J.—On a charge of assault with intent to commit rape upon a girl under the age of consent, the defendant was convicted of simple assault and sentenced to forty-five days in the county jail. He appeals from the judgment and from an order denying him a new trial.

At the request of defendant the jury were instructed that they could find the defendant guilty of simple assault.

The evidence consisted principally of the testimony of the prosecutrix, setting forth facts which, if fully believe, should have satisfied the jury that the defendant was guilty of the very crime charged in the information, and the testimony of defendant in denial of the more material parts of the testimony of the prosecutrix. It is clear that if the defendant had been convicted of the greater crime of assault with intent to commit rape, such verdict would on appeal have been treated as supported by the evidence. It is also clear that the evidence of the attempt to ravish contained in the record showed that such attempt was instituted with a violent assault and battery, and involved a continuous violent assault from its beginning up to the time the attempt was abandoned, on the approach of the mother of the girl. It is clear on the testimony of the prosecutrix that the defendant assaulted her, and it was none the less an assault because the defendant may have intended also to effect a sexual connection with her. An assault with intent to ravish, committed as indicated by the testimony of the prosecutrix herein, always includes an assault. It was for the jury to say whether this assault was accompanied by the intent necessary to constitute the higher crime. By finding the defendant guilty of simple assault, the verdict shows us that the jury saw fit to believe only that part of the story of prosecutrix that established an assault, and rejected everything that indicated an intent to ravish, refusing to draw any inference of a felonious purpose on the part of defendant. This the jury had the power to do. There is no rule of law requiring the verdict of a jury to be absolutely consistent, according to the ideas of the appellate court. It is the province of the jury to draw their own conclusions from the evidence, and where, as here, they are instructed that they may do so, it is for them to say that the defendant is guilty of one crime and not guilty of another, as they see fit. And this court will only interfere with a verdict of guilty of assault where there is no evidence showing that an assault was committed. An indecent assault always embraces a simple assault, on the theory that the greater includes the less.

Complaint is made as to many instructions of the court in relation to the age of the prosecutrix, defining the higher crime charged, as to the consent or want of consent of the prosecutrix, as to sexual intercourse with other men, etc. All these instructions related only to the higher offense. The defendant was acquitted of that offense, and we are at a loss to understand how instructions relating only to a crime of which defendant was acquitted can be said to have harmed him. Therefore, we will not stop to consider whether such instructions were erroneous or otherwise.

There was no instruction given relating to the crime of simple assault that was in any degree erroneous. In instruction XI, given at the request of defendant, the jury were given clearly to understand that they must be satisfied beyond a reasonable doubt of his guilt before they could convict him of simple assault. In instruction V they were also told that "to warrant a conviction of the defendant, he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent." The appellant is mistaken in assuming that the court did not inform the jury that before they would be warranted in convicting of assault they must be satisfied from the evidence that such an offense was committed.

Nor was there anything contained in any of the instructions that would mislead or confuse, or lead the jury into error concerning the crime of which the verdict convicts him.

Appellant is also mistaken in his assumption that instruction X as proposed by him was intended to apply to a simple assault, or to in any way guide the jury in its determination as to whether they would return a verdict of guilty of simple assault. The word "assault" in that instruction is never used by itself, but in all instances in connection with "to commit rape upon," or "to have sexual intercourse with the prosecutrix by the defendant." It applies only to the higher crime charged in the information, and, as we have already seen, the defendant having been acquitted of that crime, the giving or refusing of it, or the qualifying of it by the court, worked no injury to the defendant.

The judgment and order are affirmed.

Smith, J., and Allen, J., concurred.

[No. 15. First Appellate District.—August 17, 1905.]

CLARA BAUM, Administratrix of the Estate of Julius Baum, Deceased, Respondent, v. EDWARD ROPER et al., Defendants; J. W. REAY, JR., Appellant.

JUDGMENT—RENDITION—FINDINGS.—The making and filing of findings of fact and conclusions of law constitute the rendition of judgment.

Id.—EJECTMENT—WRIT OF POSSESSION.—In an action of ejectment a writ of possession may be executed against a defendant against whom judgment has been rendered or his grantee *pendente lite*, although the judgment had not been entered against him prior to the issuance of the writ.

Id.—ENTRY PENDENTE LITE.—A person not a party to an action of ejectment who enters into possession of the demanded premises pending the action may be dispossessed under a writ issued on a judgment against the defendants unless he clearly and satisfactorily shows that he did not enter under or in collusion with either of them.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to stay the execution of a writ of possession. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, for Appellant.

W. B. Kollmyer, and Naphtaly, Freidenrich & Ackerman, for Respondents.

HALL, J.—This is an appeal by J. W. Reay, Jr., from an order refusing to stay the execution of a writ of possession issued under a judgment in ejectment in favor of plaintiff and against defendants. Julius Baum brought an ejectment suit on the fourteenth day of April, 1892, against Edward Roper and wife, Kate Roper, and David J. Spence, to recover possession of a parcel of land situate at the southeast corner of Turk Street and Van Ness Avenue in the city and county of San Francisco, fronting fifty feet on Van Ness Avenue and one hundred and nine feet on Turk Street. Pending suit Julius Baum died, and Clara Baum, as administratrix of his estate, was substituted as plaintiff. Kate Roper also died, and her administrator was substituted.

Findings of fact and conclusions of law were signed February 5, 1897, and filed the next day, in favor of plaintiff and against all the defendants. Judgment was entered and recorded in accordance therewith February 10, 1897, but, as is afterwards found by the court, the clerk, in entering said judgment, through misprision and inadvertence, omitted the name of the defendant Spence therefrom. On the fourth day of April, 1901, a writ of possession was issued out of the court, and the sheriff was proceeding to execute the same when J. W. Reay, Jr., on the ninth day of April, 1901, obtained an order on affidavits to show cause why the execution of said writ should not be stayed. The order to show cause was discharged, and the sheriff directed to execute the writ forthwith May 28, 1901.

On May 29, 1901, the judgment was, by order of the court, amended *nunc pro tunc* as of the tenth day of February, 1897, so as in terms to run against David J. Spence.

Appellant, J. W. Reay, Jr., was not a party to the suit, but pending the same succeeded by mesne conveyances to the interest of Spence in the premises; and among other things now insists that he cannot be evicted as grantee of Spence for the reason that when the writ was issued, and when the order to show cause was heard and determined, no judgment had been entered against Spence. Before considering the main contention of appellant it is convenient to dispose of the contention just mentioned.

While it is true that an appeal will not lie from a judgment until it has been entered (*Spence v. Troutt*, 133 Cal. 605, [65 Pac. 1083]), the judgment in other respects gets its force and vitality from its *rendition* and not from its *entry*. The *rendition* of the judgment is the judicial act of the court; its *entry* is the ministerial act of the clerk. In *Los Angeles County Bank v. Raynor*, 61 Cal. 145, the court said: "But it is urged that the record shows that the judgment was not entered when the execution was issued. Nor was it necessary that it should have been. The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Code Civ. Proc., sec. 681), or in which the

judgment may be enforced (Code Civ. Proc., sec. 685); and the other for the purpose of creating a lien by the judgment upon the real property of the debtor (Code Civ. Proc., sec. 671). But neither is necessary for the issuance of an execution upon a judgment which had been duly rendered. Without docketing or entry, execution may be issued on the judgment and land levied upon and sold (*Hastings v. Cunningham*, 39 Cal. 144); and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."

To the same effect are *James v. Ballard*, 107 Cal. 132, [40 Pac. 108]; 1 Freeman on Judgments, sec. 38; *Estate of Wood*, 137 Cal. 128, [60 Pac. 900]; and *In re Cook*, 77 Cal. 232, [11 Am. St. Rep. 276, 17 Pac. 923, 19 Pac. 431].

In *Crim v. Kessing*, 79 Cal. 478, [23 Am. St. Rep. 491, 26 Pac. 1074], it was held that the making and filing of findings of fact and conclusions of law constitute the rendition of judgment. In this case findings of fact and conclusions of law were filed February 6, 1897, long before the issuance of the writ of possession.

On the second appeal of this case, taken shortly after the actual entry of judgment as to Spence, the court held that it could not consider the objection that the evidence did not support the decision of the trial court, inasmuch as the appeal had been taken more than four years after the rendition of the judgment.

The judgment having been *rendered* although not *entered* as against Spence before the issuance of the writ of possession, the writ could be executed either against Spence or his grantee.

The main contention of appellant, however, is that he cannot be dispossessed under the writ, for, although he entered into possession of the premises after suit brought, he entered as grantee of one A. W. Reay, who was not a party to the suit, and was in possession when the suit was brought, and so remained until his death in 1899. The discussion of this contention requires a somewhat fuller statement of the facts disclosed by the record before us.

In 1877 Julius Baum (the original plaintiff in this action) brought a suit in ejectment for the premises in controversy

here against J. W. Reay (father of appellant), and in November, 1887, recovered judgment against J. W. Reay for the same, which judgment was on appeal affirmed prior to the beginning of the present suit. April 8, 1885, J. W. Reay conveyed to A. W. Reay a portion of the premises, having a frontage of six feet on Van Ness Avenue by one hundred and nine feet on Turk Street, with a width in the rear of forty-eight feet. Deed was recorded July 18, 1887. May 6, 1891, Edward Roper (one of the defendants in the present action) conveyed a one-half interest in the premises in question to A. W. Reay. This deed was not recorded. March 2, 1892, Edward Roper conveyed to David J. Spence the premises in question; deed recorded the next day. (The claim of title by Roper was from a different source from that of J. W. Reay.) April 4, 1892, Baum commenced this action against Roper, his wife, and Spence.

March 6, 1893, Spence deeded the premises to A. W. Reay; deed not recorded.

February 10, 1897, judgment was rendered for plaintiff against defendants in this suit, and subsequently,—to wit, June 24, 1899,—A. W. Reay deeded premises to J. W. Reay, Jr., (appellant).

April 4, 1901, after affirmance of judgment on first appeal by defendants in *Baum v. Roper*, 132 Cal. 42, [64 Pac. 128], the writ of execution was issued.

It will thus be seen that appellant, subsequent to the rendition of judgment in this suit, and pending an appeal therefrom, obtained through his deed from A. W. Reay the J. W. Reay title (which had long before been finally determined to be invalid as against Baum) to about one half the premises, the Roper title to an undivided one half, and the Roper-Spence title to the entire premises.

Under what circumstances a person not a party to a suit in ejectment, who entered pending the suit, may be dispossessed under a writ issued on a judgment against the defendants has been considered by the supreme court of this state in numerous cases.

In *Scheerer v. Goodwin*, 125 Cal. 154, [57 Pac. 789], which was an action brought by the plaintiff to restrain the sheriff from dispossessing him under a writ on a judgment in a suit in ejectment to which he was not a party, the court said:

"Under the judgment in the action of *Goodwin v. Scheerer*, *supra*, the sheriff was authorized to remove from the land the defendants in that action, and all persons found thereon whose possession was derived under the defendants, or either of them; and, in the absence of any showing to the contrary, it will be presumed that all persons coming into possession of the premises subsequent to the commencement of that action came in under the defendants therein. . . . Upon the issue of their right to remain in possession the burden is upon them to show affirmatively that their possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the defendants in the judgment." (Citing *Long v. Neville*, 29 Cal. 131; *Leese v. Clark*, 29 Cal. 664; *Wetherbee v. Dunn*, 36 Cal. 147, [95 Am. Dec. 166].)

In *Leese v. Clark*, 29 Cal. 664, the court, repeating language used in *Long v. Neville*, 29 Cal. 131, said "*Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant." In the same case the court also said: "The fruits of a successful litigation cannot be wrested from the prevailing party, and the process of the courts evaded, upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably satisfactory."

To the same effect is *California Q. M. Co. v. Bedington*, 50 Cal. 160, where the court said: "It is incumbent upon a party seeking relief in a summary proceeding of this character to make out a clear case, free from ambiguity. A plaintiff in ejectment who recovers a judgment, perhaps after a protracted and expensive litigation, ought not to be deprived of the fruits of it, except in a case free from all reasonable doubt. The opportunity for collusion is so great, and the fraud is often so difficult of detection, that courts are reluctant to grant such relief on *ex parte* affidavits, except in cases clearly made out, and free from any reasonable suspicion of fraud or collusion." (See, also, *Sampson v. Ohleyer*, 22 Cal. 201.)

So in this case, as appellant confessedly entered after suit brought, if it can be fairly deduced from the evidence in the

record that he entered under or in collusion with either Spence or Roper, or, indeed, if he has not clearly and satisfactorily shown that he did not enter under or in collusion with either of them, the order of the trial court was right, and he must go out.

There is much evidence in the record that seems incompetent and immaterial, but certain salient points are quite clear. J. W. Reay, A. W. Reay, and Mrs. Kate Roper were brothers and sister, and J. W. Reay, Jr., is the son of J. W. Reay. It may be conceded that at the time of the bringing of this action A. W. Reay actually resided on and was in possession of the premises, and so continued till his death in 1899. It is equally certain that Edward Roper and wife also resided on the premises, and were in possession thereof at the beginning of the suit, and Roper so continued until after the death of A. W. Reay. The evidence also shows that the Ropers at the commencement of the suit were in possession as tenants of Spence, who at that time had a claim of title to the entire premises previously derived from Roper, which on its face was a better record title than the one-half interest then held by A. W. Reay (also derived from Roper), for the reason that the Spence title was under a recorded deed, while the other was under an unrecorded deed. After the bringing of this suit both these titles, as well as the J. W. Reay title to a portion of the premises (which by final judgment had been determined to be worthless as against Baum) passed to appellant by deed from A. W. Reay.

Appellant in his affidavit states: "That shortly after the death of the said Alfred W. Reay this deponent repaired said premises, papered the rooms and made other repairs thereto, and thereupon rented both of said houses to tenants, who immediately entered thereon, and they and their successors have ever since occupied and held said premises under this deponent and as tenants of his, and are now in the occupation thereof as such tenants." J. W. Reay, in his affidavit, states that "Edward Roper removed from said premises and from said city and county of San Francisco very shortly after the death of said Alfred W. Reay, and has not resided on said property or in said city and county since said date." From the foregoing two statements it is a very fair inference that the last person in the actual occupation of the premises before

the entry of appellant was Edward Roper, defendant in this action and tenant of Spence, also defendant in this action. It is significant that appellant, in his affidavit, makes no mention of the vacating of the premises by Roper. From the foregoing circumstances it is a very fair deduction that appellant received the actual possession of said premises from defendant Roper (the then only actual occupant thereof), the tenant of defendant Spence, and that he entered under the title derived from Spence. At any rate, he has not clearly shown that he did not obtain possession from Roper or enter under the Spence title. Such being the case, under the authorities above quoted and the well-established law, he ought to go out under the writ.

The order appealed from is affirmed.

Harrison, P. J., and Cooper, J., concurred.

[No. 32. Second Appellate District.—August 17, 1905.]

J. R. COATS, Respondent, v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant.

STREETS—RIGHT OF ACCESS—CONSTITUTIONAL LAW.—The right of the owner of land abutting on a city street to access over it to and from his premises is itself a right of property of which, under article I, section 14, of the constitution, he cannot be deprived without compensation.

ID.—RAILROADS—USE OF STREET—MUNICIPAL CORPORATIONS—MEASURE OF DAMAGES.—A railroad company, although it may have a license from the municipal authorities to use a street for its railroad purposes, is liable to an abutting landowner for injuries inflicted on him by such use in being deprived of access over the street to and from his premises; and in an action by the landowner to recover for the injuries so inflicted the measure of damages is the amount which will compensate him for all the detriment proximately caused by such use.

ID.—ABATEMENT OF NUISANCE—DEMAND.—Under section 3483 of the Civil Code the abutting landowner may maintain an action against the railroad to recover the damages sustained by him in being deprived of access to his premises without making a demand on the railroad for the abatement of the nuisance causing the damages.

APPEAL from a judgment of the Superior Court of Tulare County and from an order refusing a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

T. J. Norton, E. E. Millikin, and U. T. Clotfelter, for Appellant.

Charles G. Lamberson, for Respondent.

SMITH, J.—The plaintiff is the owner of a lot of land in the city of Visalia, fronting on the east side of East Street, on which, from a date anterior to the transactions involved in this case, he had, and had been, operating a foundry and machine-shop and repair-shop for machinery. The defendant is the successor in interest of The San Francisco and San Joaquin Valley Railway Company, and is maintaining in East Street, between the main track of its road and the east line of the street, a side-track erected by its predecessor on an embankment of about two feet elevation, which prevents access to the plaintiff's premises, and has thus seriously interfered with the use of the premises for the purposes of his business. The suit was brought for resulting damages, and plaintiff recovered verdict and judgment for eight hundred dollars—being the damages suffered by the plaintiff from the commencement of the maintenance of the nuisance by the defendant to the commencement of the suit. The appeal is from the judgment and from an order denying the defendant's motion for a new trial.

The points urged by the appellant, or those that need be considered, are: 1. That the side-track and embankment were constructed by its predecessor under an ordinance of the city of Visalia authorizing their construction, and hence were not unlawful, and consequently not a nuisance; 2. That under the pleadings and evidence in the case plaintiff was not entitled to recover more than nominal damages; and 3. That demand upon the defendant for abatement of the nuisance was essential to plaintiff's action, and that such demand was not made.

1. In support of its first point the defendant relies upon the license given its predecessor by subdivision 5 of section

465 of the Civil Code, "to construct its road over the street," and an ordinance of the city of Visalia authorizing it to do so. But in the license pleaded it is expressly provided, as a condition of using the street, that the corporation shall restore it "to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness." Under these and preceding provisions of the law, it has been held in many cases in this state that the consent of the city authorities to use its street for railroad purposes "in no wise touches the question of damages to private property on the line of the street," and that the right to a just compensation for the injuries thus inflicted is in no wise affected by the question whether such consent had been or had not been given. (*Southern Pacific R. R. Co. v. Reed*, 41 Cal. 262; *Schulte v. Northern Pacific Trans. Co.*, 50 Cal. 592; *Severy v. Central Pacific R. R. Co.*, 51 Cal. 197; *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290; *Beronio v. Southern Pacific R. R. Co.*, 86 Cal. 421, [21 Am. St. Rep. 57, 24 Pac. 1093].) The first case cited is, indeed, criticised in *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 196, [43 Am. St. Rep. 89, 37 Pac. 786], but the same point was not involved in that case; and what is there said upon the general subject is questioned in *O'Connor v. Southern Pacific R. R. Co.*, 122 Cal. 684, [55 Pac. 688]. But the principle in *Southern Pacific R. R. Co. v. Reed* cannot be justly questioned, for it is a settled principle that the right of the owner of land abutting on a street to access over it to and from his premises is itself a right of property, of which, under the constitutional provisions, he can no more be deprived without compensation than of any other property. (*Schaufele v. Doyle*, 86 Cal. 109, [24 Pac. 834]; *Eachus v. Los Angeles Electric Ry. Co.*, 103 Cal. 617, [42 Am. St. Rep. 149, 37 Pac. 750]; *Brown v. Board of Supervisors*, 124 Cal. 280, [57 Pac. 82].)

There was an exception, or apparent exception, to this principle in favor of the right of the municipality to grade its streets, by which it and its proper agents were exempted from liability, unless for negligence in the work. But in this case, the defendant's predecessor was not the agent of the city for that purpose; nor would the city itself have been authorized to raise embankments over portions of the street, except as part of the entire work of grading the street. Now,

demn the plaintiff's right in the street was accorded to the defendant, yet it has not thought fit to avail itself of this privilege, and it therefore stands, as we have already said, in the position of a mere tort-feasor. Nevertheless, the appellant's claim seems to be supported to some extent by the decision in *Kishlar v. Southern Pacific R. R. Co.*, 134 Cal. 636, [66 Pac. 848], where it was apparently held—in a case where the plaintiff was a leaseholder of a lot which he used in the business in which he was engaged and the value of which for that purpose was entirely destroyed by the shutting off of access to it by the defendant—that the plaintiff was entitled to recover “only the fair market value of the plaintiff's property” (i. e., of his lease). But by reference to the record in that case it will be seen that this was in effect conceded by both parties, and that the only question considered by the court was the contention of the appellant that the use of the land “to the plaintiff for a particular purpose” was “a proper element to be considered by the jury, . . . and should not be taken from the jury in arriving at market value” (p. 639); and in support of this proposition the case cited by the appellant was *San Diego Land Co. v. Neale*, 88 Cal. 50, [25 Pac. 977], which was a condemnation suit; as was also the case of *Santa Ana v. Harlin*, 99 Cal. 538, [34 Pac. 234]. Naturally, therefore, the question here involved was not considered by the court, and the decision cannot be regarded as an authority upon the general proposition.

In the present case, the damage to the plaintiff's land, and to the business carried on by him on the land, was clearly proven; and under the evidence introduced the amount found by the verdict cannot be regarded as excessive. (Code Civ. Proc., sec. 657, subd. 5; *Boyce v. California Stage Co.*, 25 Cal. 460; *Lee v. Southern Pacific R. R. Co.*, 101 Cal. 120, 121, [35 Pac. 572].)

As to the claim of the appellant that demand to abate the nuisance was necessary to the plaintiff's action, the doctrine contended for by the appellant, if previously existing, was abrogated by section 3483 of the Civil Code. (See note to this section in Reviser's Edition.) Whether want of knowledge of the existence or noxious character of a nuisance would be a defense to an action (*Grigsby v. Clear Lake Water Co.*, 40 Cal. 396), need not here be considered, as there was evi-

dence in the case to justify the jury in finding such knowledge.

For the reasons given, we are of the opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

Gray, P. J., and Allen, J., concurred.

[Crim. No. 6. First Appellate District.—August 18, 1905.]

THE PEOPLE, Respondent, v. GEORGE ROBERTS, Appellant.

CRIMINAL LAW—LARCENY—EVIDENCE OF CONSPIRACY—REASONABLE DOUBT—REQUESTED INSTRUCTION.—Upon the trial of a defendant charged with grand larceny, where the evidence showed that two other persons besides the defendant were concerned in and aided and abetted the defendant in the commission of the offense, it was proper to refuse a requested instruction that the prosecution must prove beyond all reasonable doubt, not only that the crime charged was committed, but also that the defendant and no one else committed the offense, and that in the absence of such proof the defendant must be acquitted.

12.—EVIDENCE STRICKEN OUT—REQUEST EMBODIED IN CHARGE.—A requested instruction, though proper in itself, in regard to the duty of the jury not to consider testimony stricken out by the court, was not erroneously refused where it was substantially embodied in the charge given by the court.

13.—DEFINITION OF LARCENY.—It was proper for the court in defining larceny to omit those subdivisions of section 487 of the Penal Code which have no application to the evidence.

14.—PREJUDICIAL INSTRUCTION INAPPLICABLE TO EVIDENCE.—“FRAUD, TRICK, AND DEVICE.”—It was prejudicial error tending to mislead the jury to give a lengthy instruction on the subject of larceny committed by “fraud, trick and device,” though correct in the abstract, where it was not according to the theory of the prosecution and was not responsive to any evidence tending to prove it, there being evidence only of an unsuccessful attempt so to obtain the money, in view of which the jury were probably confused by the instruction to the prejudice of the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Samuel M. Shortridge, and Frank J. Murphy, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

HALL, J.—The defendant, Roberts, was charged with and convicted of grand larceny, and this appeal is from the judgment and the order denying his motion for a new trial.

Defendant claims that the court erred in refusing to give at request of defendant the following instruction: "Not only must the prosecution prove beyond all reasonable doubt that the crime charged has been committed, but they must prove beyond all reasonable doubt that the defendant and no one else committed the offense; in the absence of such proof the defendant must be acquitted." The evidence in this case showed that two other persons besides the defendant were present and were concerned in, and aided and abetted the defendant in the commission of the offense. Under the requested instruction the jury would have been obliged to acquit the defendant although convinced that the three persons jointly and together committed the offense. Such is not the law. The instruction was properly refused.

The defendant requested the following instruction: "Offers to prove certain alleged facts which have been made in your presence are not evidence, and you should not take the same into consideration, nor allow yourselves to be in any manner influenced thereby. [Neither should the jury consider testimony stricken out by the court.]" The court refused to give the part inclosed in brackets, but gave the rest. Both propositions are sound in law, and might well have been given by the court, yet we do not think any error was committed in the refusal thereof, for the reason that the same instruction in substance was by the court given elsewhere. Thus the court said: "*The defendant is to be tried only on the evidence which is before the jury*, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted." Again it is said: "The court deems it proper to admonish you that you are not to consider evidence which has been excluded by the court in determining any fact in the case."

When the jury were told that the defendant is to be tried only on the evidence which is before the jury, they as sensible men must have understood that evidence stricken out was not before the jury, and evidence excluded may fairly be said to include evidence stricken out.

The court read to the jury as a part of its instructions section 484 of the Penal Code, defining larceny, and a portion of section 487, as follows: "Grand larceny is larceny committed in either of the following cases: 1. Where the property taken is of the value exceeding fifty dollars," and continuing, instructed the jury as to larceny committed by fraud, trick, or device.

Counsel for the defendant treats this as one instruction, and objects to the first part for the reason that the court read a portion only of section 487. In answer to this it is sufficient to say that the court read all of the section that was in any way pertinent to the charge made in the information. There was no charge in the information of a larceny from the person, neither was there a charge of larceny of any article or animal, mentioned in subdivision 3 of section 487. It was therefore quite unnecessary to read subdivisions 2 and 3 of section 487.

As to the remaining portion of the instruction as to larceny by trick and device, it is not contended that it is not correct as an abstract proposition of law, but that it is suggestive and argumentative, not predicated on any evidence in the case, and not responsive to the theory of the prosecution.

In *Blashfield on Instructions to Juries*, it is said: "Instructions to the jury should be applicable to and limited to the evidence adduced in the cause. It is erroneous to give instructions based on a state of facts which there is no evidence tending to prove, or which the undisputed evidence shows does not exist, and it makes no difference that such instructions contain correct statements of the law." (Sec. 86, citing many cases.) Again in section 91 the same writer says: "The giving of an instruction not supported by the evidence is sufficient ground for reversal where it appears that such instruction misled, or might have misled, the jury, to the prejudice of the party complaining. Where the instructions as a whole are abstract and inapplicable to the facts in issue, the judgment will be reversed. If an instruc-

tion submits an issue not warranted by the evidence, or is based on facts not in evidence, or is so worded as to lead the jury to infer the existence of a state of facts entirely at variance with the evidence, the error will almost invariably be considered ground for reversal." (Citing many cases.)

In *Clark v. State*, 32 Neb. 246, [49 N. W. 367], it was held reversible error to instruct the jury that if defendant formed a conspiracy to commit the crime, and became intoxicated to nerve himself to commit it, his intoxication would be no excuse, there being no evidence that he became intoxicated *for such purpose*, although there was evidence that he was intoxicated at the time of committing the alleged crime.

In *People v. Devine*, 95 Cal. 227, [30 Pac. 378], it is said: "In some cases an inapplicable instruction can do no harm, but when it is liable to mislead a jury, to the prejudice of one of the parties, it becomes as grave an error as though it were not correct as an abstract proposition of law." The trial court had read to the jury section 485 of the Penal Code, relating to larceny of *lost and found* property. There was no evidence of the finding of any lost property, and the giving of the instruction was held to be reversible error.

In *People v. Sanchez*, 24 Cal. 28, it was said: "No instruction should be given to a jury which is not predicated upon some theory logically deducible from at least some portion of the testimony. Such instructions are only calculated to confuse and mislead the jury, and ought not to be given."

In the case now under consideration the court gave a lengthy instruction of about six folios on the subject of larceny by trick and device, correct in the abstract, but, it is contended, not predicated on the evidence in the case. It therefore becomes necessary to examine the evidence on this point.

Perry, the prosecuting witness, testified that he was standing on the corner of Fourth and Market streets, San Francisco, on March 20th, when he was addressed by defendant, who asked Perry where he was from. Finding that Perry was from Los Angeles and a stranger in San Francisco, defendant represented that he also was a stranger to the city. The two agreed to visit the park and Cliff House together, but first the defendant induced Perry to go with him to 1344

Market Street by the representation that he was a mining man, and had some specimens of ore that he wished to have assayed by a friend who had an office at that place. On getting to 1344 Market Street, Perry was, after some objection, induced to go into the building, and, after some hunting, they found the proper room, and there found that the assayer was not in, but did find two persons, claimed to be strangers, who had apparently been playing cards. They invited Perry and defendant to join the game. Defendant did, but Perry, though urged by defendant, refused.

On the first game defendant appeared to win, and on the second game bet what change he had, and then asked Perry for a loan of twenty dollars. Perry refused, whereupon defendant took from his pocket a paper which he represented to be a check on a Denver bank, and showed it to the other parties playing the game. One of them said to Perry: "It is all right; let your friend have the money; this check is all right." Perry refused, whereupon one of the parties, called the doctor, got up and locked the door and put the key in his pocket, saying in effect that he did so for fear his wife might call and catch him gambling. Defendant then again demanded the money, whereupon Perry said, "I suppose I am a victim, and I will have to give you the money," and took off his belt in which he carried his money, and gave defendant twenty dollars. On repeated demands Perry gave to defendant altogether eighty dollars,—twenty dollars at a time,—all of which was bet by defendant on his hand, and on a call of hands was lost to one of the other players. The players then disbanded and left the premises. From all the circumstances in evidence it is certain that the three card-players were confederates. On the question of how and why he parted with his money Perry testified as follows: "So far as the game of cards was concerned I was not connected with the game, or in any manner involved in the game, as I was not a player or participant, and made no bet. I lost no money by betting. . . . I did not part with any of this money on the strength of that check; that had nothing to do with the parting of any of my money. This proposition of mines, and ore and rock, that had nothing to do with my parting with any of my money. And nobody suggested my parting with any money

on account of any mines or mining stock. I parted with \$80."

On redirect examination by the district attorney he gave testimony as follows: "I have said the defendant asked me to lend him the money. In response to that question I did not give him any money when he asked me to lend it to him. When I gave the money to him he said: 'Let me have the money.' That was immediately after the door was locked. I did not let him have any money for the purpose of having him play a game.

"Q. You yourself took no part in the game at all, and loaned him no money for the purpose of betting? That is correct, is it?—A. Yes, sir.

"Q. Why did you hand over—take off your belt and hand over \$80, \$20 at a time and four different times, making \$80 in all; why did you do that—hand that money to the defendant?—A. Because they made their demand repeatedly for the money, and I felt that they would take the money if I did not give it over willingly. I thought they would force me to give them the money; did not know whether they would knock me in the head or shoot me, but felt that they would take the money by force, and I gave up the money rather than take chances of being injured in any way.

"Q. Did you part voluntarily or willingly with any of your money?—A. I did not.

"Q. I understood you to say you feared; what kind of fear was it you had—of what?—A. There were three men in the room, and I did not know whether they would knock me in the head or shoot me or what. I was just afraid they would overpower me in some way, and take the money; I mean of personal injury. I did not have any weapon of any kind or character on me."

The witness on his direct examination gave evidence of conduct and demeanor of the three card-players tending to cause him to fear an intention perhaps to use force to get the money.

From the foregoing statements of the prosecuting witness it will be seen that he completely eliminated from the case any possible grounds for the theory that he parted with his money through any fraud, trick, or device. Yet the court in the instruction complained of fully submitted to the jury

the issue as to whether the possession of the money had been parted with as the result of fraud, trick, and device. Other than the reading of section 484 of the Penal Code, defining larceny in general terms, no other explanation of what constitutes larceny was given. By the instructions of the court stress was laid almost entirely on the issue of larceny by fraud, trick, and device. While we recognize that it is not every case of giving an instruction not pertinent to the evidence that will result in the reversal of a judgment, we are of the opinion that the giving of the instruction under discussion under the circumstances of this case was prejudicial error. The fact that there was evidence in the case tending to show an *unsuccessful* attempt to obtain the money by fraud, trick, and device made it all the more probable that the jury was misled and confused to the prejudice of the defendant by the giving of this instruction.

It is claimed that the court erred in allowing proof of the forfeiture of the defendant's bail bond "owing to the unlawful absence of the defendant," but this evidence was by the court ordered stricken out.

The objection to the question put by the district attorney—"Do you understand if a man came to you on the street, and put a pistol to your head, and you handed out the money, that the money belonged to him?"—should have been sustained, but the error is too unimportant to of itself require a reversal.

As the order and judgment must be reversed for the error in giving the instruction last herein discussed it is not necessary to determine whether or not the evidence was sufficient to sustain the verdict.

The judgment and the order denying the motion for a new trial are reversed.

Cooper, J., and Harrison, P. J., concurred.

[No. 60. Second Appellate District.—August 18, 1905.]

F. G. HENTIG, Respondent, v. C. B. WILLIAMS, MARY WILLIAMS, FRANCES E. JOHNSON et ux., and LIBBIE J. HEIDEL et ux., Appellants.

ACTION TO ENFORCE TRUST—JUDGMENT PROTECTING MORTGAGEE—AFFIRMANCE UPON APPEAL.—Where land was conveyed to one defendant in trust for the benefit of plaintiff and another defendant, and in the judgment rendered in an action to enforce the trust the holder of a mortgage which was executed by the trustee with the consent of all parties interested is fully protected, and has no right to complain of the judgment, it will be affirmed upon appeal taken by such holder therefrom.

ID.—ERROR IN JUDGMENT—FRAUDULENT SATISFACTION OF JUDGMENT—LIEN UPON TRUST LAND—REINSTATEMENT IN EQUITY—MORTGAGE BY TRUSTEE FOR REDEMPTION.—Where there was a judgment-lien upon the trust land which bound plaintiff's interest, and satisfaction was fraudulently entered by the defendant beneficiary without payment in fact, and the lien was reinstated in equity in suit against the trustee, who borrowed money upon mortgage to redeem from the lien, the judgment in equity against the trustee is binding upon the plaintiff beneficiary, and the money raised and paid by the trustee was expended for the common benefit of both beneficiaries; and it was error not to hold the interest of plaintiff subject to the reimbursement of half the sum expended by the trustee, with interest, to be paid for the use and benefit of such mortgagees.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank F. Oster, Judge presiding.

The facts are stated in the opinion of the court.

E. C. Bower, and Bower & Hutchinson, for Appellants.

J. L. Murphey, and F. G. Hentig, for Respondent.

SMITH, J.—This suit was brought to enforce a resulting or constructive trust in an undivided half of the lot of land described in the complaint, conveyed by one Zeigler to the defendant Mary Williams. The defendants Johnson and Heidel were joined as mortgagees. The plaintiff had judgment, from which all the defendants appeal.

The record contains a bill of exceptions, setting forth the evidence, with specifications of insufficiency of the evidence to justify the findings. The appeal of the defendants Williams was taken within sixty days after the entry of the judgment. The appeal of the other defendants was made after the expiration of that period.

The complaint sets forth at length all the particulars of the transactions involved, all of which are denied by the joint answer of the defendants; and in the separate answer of the defendant Mary Williams her account of the transaction is set up. The court finds all the allegations of the complaint to be true; all the allegations in the joint answer of the defendants to be untrue, except one, which is of no materiality; and the allegations of the separate answer of defendant Mary Williams to be untrue. It also find specifically the facts as to the various transactions involved in the suit. To all and singular of which findings, or nearly all, objection is made that the evidence was insufficient to justify them; and it is also claimed that some of them are contradictory. Many of these objections are to immaterial matters, and whether they be well founded or not need not be considered. But on one material point relating to the mortgage of the defendant Heidel, the objections made are well taken. As to the rest of the findings, though the evidence is conflicting, they are fully supported by the evidence.

Briefly stated, the case as shown by the findings is this: Prior to the execution of the deed from Zeigler to the defendant Mary Williams, one Mrs. Casenave was indebted to Hentig and Williams in several small sums, and was proposing to sell certain lands belonging to her to Zeigler, who, in part payment of the purchase money, was to convey to her the lands in controversy; and with reference to this land, it was agreed between her and Hentig and Williams that the lands of Zeigler should be taken as part of the purchase money, upon their agreement to raise the sum of six hundred dollars thereon by mortgage, and to pay the same to Mrs. Casenave, which was done. Afterwards, it was agreed between the parties that the land should be conveyed to Mrs. Williams for the benefit of Hentig and Williams, and that the mortgage thereon should be executed by her. Accordingly, the conveyance was made to Mrs. Williams, who took with full

notice of the facts; and contemporaneously with the deed, or a few days thereafter, the mortgage on the lot was executed by Mrs. Williams to one McConnel for the sum of six hundred dollars, which was paid to Mrs. Casenave. This mortgage was afterwards assigned to the defendant Mrs. Johnson, and is now held by her; and by the decree of the court the interest of the plaintiff and the defendants Williams is made subject to her mortgage. The defendant Mrs. Johnson, therefore, has no cause to complain, and the judgment as to her must be affirmed.

The only serious question in the case is as to the mortgage of the defendant Mrs. Heidel, as to which the facts disclosed by the evidence are as follows: Prior to the date of the transaction involved, one Bamberger held a judgment against Mrs. Casenave for the sum of \$834, which constituted a lien upon her lands, and in order to complete the transaction it was necessary that this judgment should be satisfied. Accordingly, it was agreed between him and Williams, as the agent of Mrs. Casenave, that Bamberger would take the sum of \$433.56 in satisfaction of the mortgage; and that to carry out this agreement he would deposit the acknowledgment of satisfaction with the Title Insurance and Trust Company in escrow, to be delivered to Williams upon the payment of the amount agreed upon. Accordingly, the acknowledgment of satisfaction was executed, and, with escrow instructions, was delivered to Williams to be delivered to the trust company; but Williams fraudulently filed the satisfaction of judgment with the county clerk, and did not deliver it to the trust company; and thus the conveyances of Mrs. Casenave and of Zeigler were effected. Thereafter, February 9, 1901, upon the discovery by Bamberger of the fraudulent satisfaction of the judgment, he, by appropriate proceedings, had said satisfaction vacated; and afterwards, March 11, 1901, the land was sold under execution and purchased by Bamberger for two hundred and fifty dollars. Following this transaction, a suit was commenced by Bamberger against Mrs. Casenave and the defendants Williams, setting up the above facts, which resulted in a judgment for the plaintiff therein, of date November 27, 1901, adjudging that the title to the land in question was held by the defendant Mary Williams in trust for the said plaintiff, and that in case no redemption

should be made, a deed should be executed to him accordingly. The rendition of this judgment is found by the court, and the judgment itself, with an agreed statement of the record, appears in the bill of exceptions. It is also found by the court that the mortgage to Mrs. Heidel, which was for the sum of two hundred dollars, was executed by Mrs. Williams, March 18, 1902, and that with the sum so obtained she settled the claim of Bamberger under his judgment, and purchase, for the sum of \$218.50. It is, indeed, also found "that the plaintiff . . . was in no way responsible for or chargeable with said Bamberger judgment, or any part thereof"; and, in effect, that no benefit was received by the plaintiff from the money borrowed from Mrs. Heidel. But the contrary appears from the facts specifically found. Upon these facts, it appears that upon the vacation of the satisfaction of Bamberger's judgment against Mrs. Casenave, it became a lien upon the land in controversy; and that the judgment of Bamberger against Mrs. Williams, the plaintiff's trustee, was binding upon plaintiff. The money paid, therefore, by Mrs. Williams for the removal of this lien and the satisfaction of the judgment was expended for the common benefit of the plaintiff and the defendants Williams, and the former is chargeable with his proportion thereof. The judgment must therefore be modified by adjudging the interest of the plaintiff in the land to be subject, not only to the mortgage of Mrs. Johnson, but also to the payment to Mrs. Williams of one half the sum of \$218.50, with legal interest thereon from the eighteenth day of March, 1902, for the use and benefit of the defendant Mrs. Heidel.

The judgment appealed from is reversed, and the cause remanded, with directions to the lower court to modify the judgment as above indicated; and that the judgment so modified shall stand affirmed.

Gray, P. J., and Allen, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 16, 1905.

[No. 54. Second Appellate District.—August 21, 1905.]

H. M. REED et al., Respondents, v. R. McDONALD, Appellant.

SALE OF HAY—ESTIMATED TONNAGE—ACTION FOR EXCESS OF MONEY PAID—BURDEN OF PROOF.—In an action to recover an alleged excess of money paid for hay sold, under an alleged agreement between the parties to adjust any excess or deficiency of tonnage at a fixed price per ton, paid upon an estimated amount, the burden is upon the plaintiffs to show that under the contract alleged in the complaint there was a deficiency in the estimated quantity paid for.

Id.—MODE OF MEASURING TONNAGE—ORAL MODIFICATION OF WRITTEN CONTRACT—EXCLUSION OF ORIGINAL.—Where the plaintiffs relied upon an oral modification of a written contract as to the mode of measuring the tonnage of the hay sold, and had offered the written contract, and had withdrawn it before ruling upon objection of defendant as to variance, such objection cannot be considered; but it was prejudicial error subsequently to exclude the written contract when offered by defendant to show its stipulations as to such mode. In the absence of the original contract the oral modification thereof could not be satisfactorily determined.

Id.—SALE OF PART OF HAY DELIVERED—PARTIES.—Purchasers from the plaintiffs of part of the hay delivered are not necessary parties to the action to recover the excess of the money alleged to have been paid by plaintiffs to defendant upon his sale to plaintiffs.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Laird & Packard, for Appellant.

Smith & Allen, for Respondents.

ALLEN, J.—Plaintiff's complaint avers that on February 20, 1900, they bought of defendant a stack of baled hay containing six hundred and fifty tons, more or less, at \$8.75 per ton; that it was agreed that until the hay was removed and the true tonnage learned, plaintiffs should pay the contract price therefor to defendant, and when the hay was moved

and the true tonnage ascertained, if there was more or less than six hundred and fifty tons, the excess or deficiency should be adjusted between the parties at the selling rate per ton. The plaintiffs paid the price based on the estimate. Afterwards, on February 1, 1901, plaintiffs allege that they completed the removal of the hay and ascertained that the stack contained but four hundred and seventy-one tons, plus, which deficiency, at the rate named, amounted to \$1,563.20. Defendant denies that the removal of said hay was ever completed, or any ascertainment was ever had that said stack contained four hundred and seventy-one tons, plus, only; and alleges further that at the date of the commencement of the action, and long prior thereto, the hay had been sold to and was the property of others not parties to the action, who were and still are living.

Findings and judgment for plaintiffs, and from the judgment and order denying a new trial defendant appeals.

It appears from the evidence that possession of the hay was delivered to the purchasers at the date of the purchase, and that the purchasers caused the same to be insured in their names and returned the same for tax-assessment as their property. Although, at the time of the sale, they returned the keys of the corral in which the hay was situate to the seller, he was to deliver the same upon the purchasers' request to those whom they might desire to remove the hay. It further appears that plaintiffs commenced the removal of the hay about March 1st, under an agreement with the seller (whether in harmony with the written agreement or not does not appear from the record) that the weights should be determined by reference to tags placed in each bale by the baler; and under this arrangement plaintiffs removed three hundred seven and one quarter tons, the weights of which, it is shown, were satisfactory to all parties; plaintiffs having on the day of their purchase sold three hundred tons of the hay to one De Groot, who, after the removal of the hay above specified, employed a man named Loveland to remove and ship his three hundred tons of hay. There is testimony offered by plaintiffs tending to show that De Groot and plaintiffs had a conference with defendant before De Groot commenced the removal of the hay, at which it was agreed that, instead of De Groot weighing and determining the weights

as by the contract provided, the car-weights of the railroad company should be accepted. The evidence is without conflict, however, that defendant refused to accept car-weights from De Groot, or weights of any kind from Loveland, his agent. During the progress of the trial plaintiffs offered in evidence the original written contract between plaintiffs and defendant, executed at the time of the sale, to the introduction of which the defendant objected because it was in terms different from the terms set out in the complaint. Thereupon plaintiffs withdrew the offer. This objection on defendant's part seems to have been captious; but the offer having been withdrawn before any ruling of the court was had upon the question, the incident is not worthy of notice.

During the cross-examination of one of the plaintiffs, and subsequently when defendant was putting in his testimony, he offered in evidence, after proper identification, the written contract between the parties with reference to the sale of this hay, it having been stated in open court by plaintiff's attorney that this contract contained stipulations as to the manner in which the tonnage should be determined. The introduction of the written contract was objected to by plaintiffs as being incompetent and irrelevant, which objection was sustained. This was error. The burden was upon the plaintiffs to show that under the contract, as set out by them, there was a deficiency in the quantity estimated; and on this question the manner of weighing or determining the tonnage provided in the contract was a material matter.

Plaintiffs' contention, however, was, and is, that this written agreement was changed by an oral executed agreement, by the terms of which the manner of ascertaining the tonnage was changed. But on the evidence in the records there is a question whether the modifying agreement was so far executed as to give it validity; and in the absence of the original contract, the question cannot be satisfactorily determined.

The prejudicial character of the error in excluding this written contract is apparent throughout the entire record.

The purchasers from Reed were not necessary parties to this action.

Judgment and order reversed.

Gray, P. J., and Smith, J., concurred.

[No. 47. Third Appellate District.—August 23, 1905.]

W. A. FOUNTAIN, Appellant, v. CITY OF SACRAMENTO,
Respondent.

CONVERSION—WAIVER OF TORT—ASSUMPSIT.—Where personal property has been wrongfully taken and converted, the owner has his election to sue in tort for the conversion or he may waive the tort and sue in *assumpsit*, on an implied contract to pay the reasonable value of the property.

MUNICIPAL CORPORATIONS—SACRAMENTO—ILLEGAL CONTRACT—ESTOPPEL.—The city of Sacramento, the charter of which forbids it from entering into any kind of a contract for the expenditure of more than one hundred dollars unless authorized by a vote of the board of trustees, given in the manner therein provided, is not estopped to dispute its liability for materials of a greater value than one hundred dollars furnished to the city at the mere request of one of its trustees, although such materials were used by it for a municipal purpose, and it had previously paid for materials of a less value than one hundred dollars similarly ordered and used.

ID.—KNOWLEDGE OF CHARTER PROVISIONS.—One who furnishes materials to a municipal corporation is charged with knowledge of its charter provisions in force at the time.

APPEAL from a judgment of the Superior Court of Sacramento County. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

White & Miller, for Appellant.

Hiram W. Johnson, A. A. De Ligne, and D. L. Donnelly,
for Respondent.

CHIPMAN, P. J.—The action is for the value of forty-four thousand bricks alleged to have been sold and delivered to defendant by plaintiff, of the value of four hundred and forty dollars. A claim was presented to defendant by plaintiff, after the bricks had been used by defendant, demanding payment, which set forth the wrongful taking from plaintiff and conversion by defendant of the said bricks; this claim was rejected and thereupon plaintiff brought the action. The court found that plaintiff, at the request of C. W. Paine, one of the trustees of defendant, delivered a lot of bricks at the city cemetery which this trustee told him were to be used in

building a wall around a portion of said cemetery, and that from the representations made to him by the trustee at the time, plaintiff understood that the bricks were being sold by plaintiff to defendant, and that defendant would pay for them; that there were fifty-three thousand bricks worth ten dollars per thousand, and that plaintiff presented a claim for nine thousand, and this claim was allowed and paid; that the bricks unpaid for were actually used by defendant in constructing said wall and still remain there; that "no express contract was made between plaintiff and defendant, nor did the board of trustees of defendant take any action whatever in relation to ordering the bricks, or in the nature of calling for bids, accepting of a bid or letting of a contract for the purchase of the bricks." The court found as conclusions of law that defendant is not liable on an implied contract, or in *assumpsit*, but if liable at all, is liable only for the conversion of the bricks, and that plaintiff has, therefore, mistaken his remedy. Judgment passed for defendant from which plaintiff appeals on the judgment-roll alone.

It has been frequently decided by the supreme court of this state that where personal property has been wrongfully taken and converted, the owner has his election to sue in tort for the conversion, or he may waive the tort and sue in *assumpsit*, on an implied contract to pay the reasonable value of such property. (*Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380; *De La Guerra v. Newhall*, 55 Cal. 20; *Lehmann v. Schmidt*, 87 Cal. 15, [25 Pac. 161]; *Chitenden v. Pratt*, 89 Cal. 178, [26 Pac. 626]; *Lataillade v. Orena*, 91 Cal. 565, [25 Am. St. Rep. 219, 27 Pac. 924]. See, also, Pomeroy's Remedies and Remedial Rights, secs. 568-571.)

In *Roberts v. Evans*, the action was to recover the value of certain personal property alleged to have been sold and delivered by plaintiff to defendant, and proof of the wrongful taking was held sufficient to sustain *assumpsit* for its value. In *De La Guerra v. Newhall* the complaint alleged an express promise, and evidence of the wrongful taking of the property under an implied promise was held sufficient, and proof of an express promise to pay was unnecessary.

The court erred in its conclusion that plaintiff could not recover for the sole reason that he had chosen the wrong form of action. If, however, the judgment can be sustained

on any ground it is our duty to affirm it. The charter of the defendant city provides that "no contract for the payment of more than one hundred dollars shall be effective unless authorized by a vote of the board of trustees," of whom there are nine. The charter directs as to the course to be taken when a contract is so authorized. The mayor must approve or disapprove; if he disapprove, the trustees must proceed to consider and vote on the contract and on the affirmative vote of six it shall become a valid contract the same as if signed by the mayor, and not otherwise. Charter section 23 (Stats. 1893, p. 551), subdivision 22 of section 25 (Stats. 1893, p. 553) confers the power on the board to make appropriations for certain purposes; also to make contracts "for the use and benefit of the city," in all cases specifying the fund out of which payment is to be made, and it is provided that "should the board, or a majority thereof, contract or create any debt against the city contrary to the provisions of this charter, such debt, claim or obligation shall be null and void as against the city or any of its funds." The charter gives the board power "to control, enlarge, improve, or abolish the cemeteries heretofore belonging to the city, and to create other cemeteries" (subd. 24, sec. 25; Stats. 1893, p. 554); and their control and management are provided for by article XV, section 194, et seq., Stats. 1893, p. 604.

It is perfectly clear that there was no express contract, as the court found. The charter forbids any kind of a contract for the expenditure of more than one hundred dollars, unless authorized by a vote of the board of trustees given in the manner therein provided. It must be upon some principle of estoppel or upon an implied contract or liability arising independently of charter provisions that relief may be given, if at all. The case may appear to justify the doctrine of equitable estoppel as applied in some cases decided by our supreme court, cited by appellant. It seems to us, however, that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal boards of trustees to incur liabilities, which have been placed in charters, it will be impossible to bring any such results about if the provisions must give way under all circumstances to the principle upon which equitable estoppels are generally applied. Plaintiff must be charged with knowledge of the char-

ter provisions in force when he delivered the bricks. He therefore knew that a single trustee—one out of nine—could not legally act for all, and there is no pretense that this trustee was acting as the agent of his co-trustees or that he assumed to so act. And if he had assumed to be acting for all, and plaintiff so understood it, the principle of ostensible agency does not extend to such a case. Plaintiff would still be put upon inquiry as to the trustee's authority to so act, for plaintiff is presumed to have known that no liability against defendant for over one hundred dollars could be legally created except in the manner provided by the charter. It appears that Mr. Paine acted without consulting his co-trustees, and in entire disregard of charter provisions. It does not appear, except inferentially, that the other trustees had any knowledge of the transaction relating to the forty-four thousand bricks. They seem to have had some knowledge as to nine thousand, for they caused the claim for them to be paid. The charter restrictions were enacted to protect the property-holders of the city, plaintiff among them, against just such transactions as this one. Plaintiff acted as much in violation of the charter as did the trustee who bargained with him. These facts and considerations take from the final action of the trustees, in rejecting the claim, much of its apparent inequity. Instances are becoming too frequent where parties endeavor to fix illegal liabilities upon municipalities under the doctrine of equitable estoppel, thus seeking to avoid injurious consequences which they knowingly brought upon themselves. The courts have in some cases of peculiar hardship, and where the circumstances seemed to demand it, come to the relief of persons dealing with municipalities. Appellant has cited some of these in support of his contention, notably *Higgins v. San Diego Water Co.*, 118 Cal. 524, [45 Pac. 824, 50 Pac. 670]; *Sacramento Co. v. Southern Pacific Co.*, 127 Cal. 217, [59 Pac. 568, 825]; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, [73 Pac. 189]. The still later case of *Times Publishing Co. v. Weatherby*, 139 Cal. 618, [73 Pac. 465], it seems to us is so nearly parallel with the case before us as to be controlling. In that case some printing work had been done under a contract entered into by the city council of the city of Eureka and payment therefor was ordered by them. The treasurer,

Weatherby, refused to pay the claim. The court said: "The ground upon which respondent failed to pay the warrant was, that no valid contract for printing was made as required by the city charter. Section 167 of the charter has this sweeping provision: 'The city of Eureka shall not be, and is not, bound by *any contract*, or in any way liable thereon, unless the same is made in writing by order of the council, and the draft thereof approved by the city attorney and the council and the same ordered to be and be signed by the mayor or some other person authorized thereto in behalf of the city; but the council, by an ordinance, may authorize an officer, committee, or agent of the city to bind the city without a contract in writing for the payment of any sum of money not exceeding three hundred dollars.' There was no compliance with this provision touching the printing here involved, and it is so stringent and prohibitive, and so comprehensive in its scope, that we see no way to protect appellant from the harsh consequences which follow the neglect to have the contract executed as required by the charter." We have carefully compared the charters of these two cities, and, while there is a difference in phraseology, we discover no substantial difference in their meaning; both are equally stringent, prohibitive, and comprehensive, though different in their forms of expression. No court, with consistency, could deny relief in the one case and allow it in the other. This doctrine of equitable estoppel was invoked in *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, [45 Pac. 863]. There the work had been completed, accepted, and ordered paid, but the auditor refused to draw his warrant on the treasury. The court said: "In entering into the contract, the plaintiff was charged with knowledge of all the limitations upon the powers of the board of supervisors. He knew that the board had no power to authorize the contract for doing the work, unless it had invited sealed proposals therefor, and he entered into the contract with the knowledge that he had not made any proposal for doing the work. Having thus performed a contract which he knowingly entered into in disregard of statutory requirements, he is not in a position to claim any equitable consideration by reason of its performance." The court further said that to enforce a promise subsequently made to pay for work which had been con-

tracted for in disregard of charter restrictions "would set at naught all limitations upon municipal powers, and, as was said in *Sutro v. Pettit*, 74 Cal. 337, [5 Am. St. Rep. 442, 16 Pac. 7], 'put the people in the complete power of careless or unscrupulous officers.' "

The Consolidation Act of San Francisco was probably more stringent than the Eureka or the Sacramento charter; but we do not think the courts should split hairs, or be eager to discover distinctions between charters, in order to protect persons who have knowingly acted in violation of their plain provisions, even though the municipal authorities have participated in such violations.

Sacramento Co. v. Southern Pacific Co., 127 Cal. 217, [59 Pac. 568, 825], was a case where the supervisors of the county agreed with defendant to share the cost of a bridge to be used jointly by the people for general travel and by defendant for a railroad track. The bridge was completed under the contract which was entered into by plaintiff and defendant, in good faith and upon advice of plaintiff's law officer, and defendant was paid by plaintiff for its expenditures as provided by the contract. Subsequently the county undertook to recover back this money, but the court held against it, although apparently conceding that the contract might have been declared void had timely proceedings been instituted. We can conceive of many reasons why the county should be estopped from recovering back money paid out under such circumstances which would not apply here.

In the Contra Costa Water Company case the circumstances were peculiar and quite different from the facts in the present case. It appeared that "the city council, in its corporate capacity, did absolutely approve respondent's claims and ordered them paid." Furthermore, "there were no 'restrictions imposed by the charter' absolutely prohibiting the action of the city council involved." Besides, the city was under the necessity of having water from day to day, and in point of fact, the claims made out and ordered paid by the council were at a less rate than had been declared reasonable by the ordinance of the city. The principle of estoppel was applied, as in the Sacramento County case, but there is a broad distinction between the two cases and the one here.

Higgins v. San Diego Water Co., 118 Cal. 424, [45 Pac. 824, 50 Pac. 670], was likewise peculiar in its circumstances. For an explanation of the scope of the decision we refer to concurring opinion of Chief Justice Beatty in *Contra Costa Water Co. v. Breed*, 139 Cal. 432, [73 Pac. 187], in which he shows how it came about that recovery could be had upon *quantum valebat* while denying the validity of the contract. The case lends no strength to appellant's contention.

Whatever may have been the reasons in the cases cited by appellant for avoiding the enforcement of the restrictions upon the powers of municipalities there involved, we do not think the doctrine of equitable estoppel should be extended to the present case, or any similar case. To do so would be to throw down all the bars that have been raised to protect the people from the consequences of charter violations and would smooth the way to dangerous inroads upon municipal treasuries. There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss.

The judgment is affirmed.

Buckles, J., and McLaughlin, J., concurred.

[No. 33. First Appellate District.—August 24, 1905.]

In the Matter of the Estate of CHARLES PATRICK
McCARTHY, Deceased.

HOMESTEAD—ESTATES OF DECEASED PERSONS—VALUE—EVIDENCE RECEIVED AFTER SUBMISSION OF CONTEST—APPRAISEMENT.—After a contest by a creditor of an insolvent estate of a deceased person to an application by his widow to have certain premises set aside as a homestead has been tried and submitted for decision, the issue involved being whether the value of the premises sought to be set aside was in excess of five thousand dollars, it is error for the court, without the knowledge or consent of such creditor, to appoint appraisers and receive the evidence contained in their appraisal

as to the value of the premises; and an order setting aside the premises as a homestead, based upon the evidence of value contained in such appraisement, of which no notice was given the creditor as required by section 1478 of the Code of Civil Procedure, will be vacated.

APPEAL from an order of the Superior Court of Santa Cruz County setting aside a homestead. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Wyckoff & Gardner, for Appellant.

James A. Hall, for Respondent.

HALL, J.—Appeal from order setting apart a homestead to the widow of deceased.

The petition for the order states that the premises therein described were selected by deceased in his lifetime as a homestead from community property, and that the value of the same does not exceed five thousand dollars, and is valued in the inventory at five thousand dollars, and was of less value than five thousand dollars—to wit, of the value of about two thousand dollars—at the time of the selection of the same as a homestead.

The appellant, a creditor of the estate, filed her written opposition to the petition, in which she alleged, among other things, that the value of the premises sought to be set apart as a homestead is greatly in excess of five thousand dollars,—to wit, nine thousand dollars or thereabouts,—and that its value at the time of selection exceeded five thousand dollars, and was fifty-five hundred dollars.

It is admitted that the estate will be insolvent and there will be no money to pay appellant's claim if the premises are finally set apart as a homestead.

If the premises did not exceed in value the sum of five thousand dollars at the time they were appraised in the probate proceedings it was the imperative duty of the court to make the order setting them off to the petitioner. The main issue upon which the matter was tried in the lower court was as to the value of the premises. Many witnesses were called and examined, and thereupon the matter was submitted.

The judge afterwards filed an order in writing in which it is stated: "The evidence here shows that the property in question is of greater value than \$5,000, and that the two claims presented are just debts against the estate, and that the same should be paid before an order is granted placing the property beyond the reach of said creditors." The judge further stated in the order that it was his "opinion that our statute does not authorize the superior court of this state to set apart a homestead of greater value than \$5,000 when the making of such an order would defeat the collection of just claims of creditors. Under the facts as developed by the evidence, the court will defer action on said petition until another inventory is made and filed herein, when such further action will be taken as may appear legal and just to all parties concerned."

The above order was made November 4, 1903, and, of course, did not decide the contest before the court.

Two days after the above order was made, without notice to appellant, the court appointed three appraisers to appraise the homestead premises. The appraisers so appointed afterwards returned an appraisement, in which they valued the property at five thousand dollars, and fixed the value at the time of its selection at two thousand dollars.

The court thereafter, without notice to appellant, and without setting any time for hearing the report of the appraisers, made an order setting apart the premises as a homestead.

The appellant afterwards made a motion to set aside the order so made, and asked that a day be set for the further hearing of the application at which all parties interested should have notice and an opportunity to be heard. In support of the motion so made the appellant filed affidavits stating, "that said new inventory and appraisement was never offered or received in evidence at the hearing of said matter or at any adjournment thereof, or at any time or at all, when said creditors or their attorneys had an opportunity to be heard thereon; that no notice was ever given to said creditors or their attorneys of said last-mentioned application of said attorney of said petitioner for the setting off of said homestead."

The affidavits further stated that the value of the premises so set apart was greatly in excess of five thousand dol-

lars, "as appears by the testimony of the witnesses at said former hearing, and as appears by the findings of the court in its order made after said hearing."

The court denied said motion of appellant and refused to reopen said matter. Afterwards, on the eleventh day of January, 1904, the court made and filed findings, in which it is found "That on or about the 16th day of November, 1903, this court ordered a reappraisement of said property, and duly appointed appraisers in that behalf, and that on or about the 24th day of November, 1903, said reappraisement was duly returned to this court, and was a unanimous report of three appraisers so appointed, and said appraisers did value and appraise said real property at the time said appraisal was made to be the sum of \$5,000; and they did further find, ascertain and appraise the value of said real property at the time the same was selected as a homestead. as aforesaid, to be the sum of \$2,000." The court further found "That said property is not now and never has been of the value of more than \$5,000," and also found that at the time of its selection it was of the value of two thousand dollars.

It was error for the court to appoint appraisers and receive the evidence contained in the appraisal made by them without the knowledge or consent of appellant after the investigation had been closed. The court had no more right to do this than it would have had to hear the evidence of three new witnesses in the absence of appellant and her counsel after the case was closed. The first appraisal valued the property at five thousand dollars. The very object of the contest made by appellant was to have the value of the property determined in court from the testimony of witnesses, who were subject to cross-examination. After such witnesses had been produced, and the court was convinced that the value of the property exceeded five thousand dollars, and the matter submitted, it was a submission as to all parties. To hear the application for new appraisers, and to appoint them, and receive and act upon their report, was taking more testimony on one side only. The code provides, under article II of chapter 5 (secs. 1474 to 1486) of the Code of Civil Procedure, for appointing appraisers in certain cases where there is a question as to the value of the homestead.

In such case, when the report is filed, "the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected." (Code Civ. Proc., sec. 1478.)

If it be conceded that the court had the right to order a reappraisement of the homestead under section 1478 of the Code of Civil Procedure, it must be admitted that under the same section the court should set a day for hearing any objections to the report made by the new appraisers, and cause notice thereof to be given. The court not only did not set a day for hearing any objections to the report, but refused to hear the appellant upon her direct application to be heard. This, we think, was error.

It is urged that the court found that the value of the property at the time of filing the declaration of homestead was two thousand dollars, and that this finding justified the order setting it apart. It is sufficient to say that such finding is based entirely on the report of the appraisers appointed after the matter was tried; and as before said such *ex parte* report is not evidence. The only evidence taken on the hearing of the petition and objections thereto as to the value of the premises at the time of its selection as a homestead was that of one witness, who testified that the property was worth seventy-five or eighty dollars per acre. (There were forty-one acres in the premises.) It may be fairly supposed that the witness in giving the value as so much per acre referred to the land only, and did not include the improvements, especially as another witness put the value of the improvements at two thousand dollars. We would thus have the reappraisement as the only evidence tending to show that the premises when selected as a homestead were worth less than five thousand dollars.

Not only this, but the testimony in the case, and the order made by the court after the case was submitted, show that the theory of the petitioner was, that the property did not exceed in value five thousand dollars at the time of the hearing.

We do not intimate that it would make any difference in the result if the value at the time of filing the declaration

were conceded to be two thousand dollars. It is not necessary to decide that question on this appeal.

The order is reversed.

Cooper, J., and Harrison, P. J., concurred.

[No. 68. Second Appellate District.—August 24, 1905.]

B. F. ELLIS et al., Respondents, v. W. J. DOHERTY, Appellant.

MONEY HAD AND RECEIVED—PLEADINGS—FINDINGS.—In an action to recover a balance of money alleged to have been delivered to the defendant for the use of the plaintiff, in which the answer admits the receipt of the money and sets up that by an agreement between the plaintiff and the defendant the latter paid to himself a portion of the balance sued for, findings as to the specific terms of such agreement are within the issues presented by the pleadings.

APPEAL from a judgment of the Superior Court of Kern County. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

Smith & Allen, for Appellant.

Edwin Baxter, and T. F. Allen, for Respondents.

ALLEN, J.—Plaintiffs in their amended complaint, and for a third cause of action, allege that defendant is indebted to them in the sum of \$43,244.59, upon an account for lawful money delivered by the plaintiffs to defendant for plaintiffs' use and benefit, which sum defendant promised and agreed to pay; the non-payment of which, except the sum of \$41,315.57, is alleged, and that there was unpaid the sum of \$1,929.02, with interest from May 13, 1902. Defendant in his answer admits receipt of such money, but avers that he paid out of the same to other parties, creditors of plaintiffs, the sum of \$41,495.32; that by agreement between plaintiffs and defendant he paid to himself one thousand dollars, and

denies that any balance in excess of \$749.27 is in his possession.

Upon the trial the court found that the defendant had not paid out of said moneys any sum in excess of \$41,315.57; that there was no agreement that defendant should pay himself one thousand dollars, but, on the contrary, the agreement was, that after the payment to plaintiffs of four dollars per day each, for time employed in the construction of a building in connection with which plaintiffs' money was received by defendant, if sufficient profit remained growing out of such construction, defendant should have one thousand dollars. The court finds that when the building was completed and the per diem due defendants deducted, there remained but two hundred dollars of profit applicable to the payment of defendant's demand. It was further found that pending the action defendant had paid plaintiffs \$729.02; and judgment was rendered for one thousand dollars, which was the balance found by the court remaining in defendant's hands, after crediting him with the two hundred dollars.

From this judgment defendant appeals, the sole question presented by appellant being that the findings and judgment do not rest on the pleadings. There is no merit in this contention. The answer, setting up the agreement by which defendant was to pay himself out of the funds one thousand dollars, presented an issue, and in its determination the court properly found the facts in relation to the agreement under which the payment, or any payment, was due defendant. The findings are within the issues and they support the judgment, and the judgment is affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 51. Second Appellate District.—August 25, 1905.]

**F. G. WOOD et al, Respondents, v. LOS ANGELES TRAC-
TION COMPANY, Appellant.**

NEGLIGENCE—COLLISION OF STREET-CARS—VERDICT NOT EXCESSIVE.—

Where plaintiff was seriously injured as the result of a negligent collision between two street-cars upon defendant's road, and the evidence is such that a verdict for no more than two thousand dollars would not warrant any interference on the part of this court, with indulgence of any presumption that the jury in returning a verdict for that amount must have been influenced by anything other than the evidence, it cannot be disturbed as excessive.

Id.—OPINIONS OF MEDICAL EXPERTS—REQUESTS FOR CAUTIONARY IN-

STRUCTION.—It was not error to refuse to give a cautionary instruction requested by the defendant in reference to the opinion evidence of medical experts.

Id.—FAILURE TO CALL CONSULTING PHYSICIANS—REQUESTED INSTRU-

CTION AS TO WEAKER EVIDENCE.—Where the plaintiff called the physician who regularly attended upon her, her failure to summon mere consulting physicians, who saw the patient but once or twice, was not such as to warrant a requested instruction that where a party offers weaker and less satisfactory evidence, where it appears that stronger and more satisfactory evidence was within his power, the evidence offered should be viewed with distrust; and such request was properly refused.

Id.—INSTRUCTION AS TO "SURROUNDING CIRCUMSTANCES"—CONSTRU-

TION.—An instruction to the effect that the jury were not only to consider all the evidence of the witnesses, but also "all of the surrounding circumstances, and draw all the inferences from such circumstances and from the testimony of witnesses as may be reasonably drawn," is to be construed as meaning only such circumstances as might be developed by the evidence, especially where the jury, in other instructions which should be construed together therewith, were expressly limited to a consideration of the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. **M. T. Allen, Judge.**

The facts are stated in the opinion of the court.

E. E. Millikin, for Appellant.

S. P. Malford, and Harris & Harris, for Respondents.

GRAY, P. J.—This is an action by a husband and wife to recover damages for an injury suffered by the wife as a passenger upon the defendant's street-car, by reason of a collision between two of defendant's cars. The plaintiffs had a verdict and judgment for two thousand dollars. At the trial of the case the liability of the defendant for the injury was conceded, the only thing contested being the amount of damages the plaintiffs were entitled to recover. The defendant appeals from the judgment and from an order denying it a new trial.

The evidence in the case showed that in the collision Mrs. Wood was hurled violently from the car and struck the street upon her head and shoulder; that she received a severe cut of the scalp, through to the skull and about two and one half inches in length; that she sustained a severe injury to her arm and shoulder, and apparently a concussion of the brain which rendered her stupid and unable to recognize her immediate relatives and friends for some hours thereafter; that she was confined to her bed and under the care of physicians for about three weeks after the injury; that her arm continued in a paralyzed and lifeless condition, as she described it, and that she was compelled to wear bandages thereon for three months after the accident. She testified that at the time of the trial, nearly a year after the accident, she could still feel the effects of the injury, and that she did not have the same use of her arm that she had before the injury; and that still at times she could feel sharp shooting pains, from which she could locate the very spot of the scar on her head, and that she had resulting swelling of the glands of her neck from the injury that she had received to the side of her head. She also testified that she suffered much wakefulness and loss of sleep since the injury; that prior thereto she had been a good sleeper, but a poor sleeper since. And the evidence also showed that the shock which she had received had apparently permanently affected her memory. This, perhaps, is not a very full statement of the evidence; nor does it seem necessary to state the evidence fully. It is sufficient to say that with a doctor's and nurse's bill of about three hundred dollars, and the injuries already indicated, we can see nothing in the verdict for no more than two thousand dollars that would warrant any interference on the part of the court, or

the indulgence of any presumption that the jury in returning a verdict for that amount must have been influenced by anything other than the evidence.

Appellant contends that the court erred in refusing to give, at the request of defendant, the following instruction: "And you are further instructed in this connection, that the opinion evidence of medical experts should always be examined with great caution, and weighed carefully in connection with all the other evidence in the case, and that in weighing the evidence you have a right to exercise your judgment in the light of your own general knowledge upon the subject or subjects concerning which the evidence has been introduced."

We are aware that the supreme court of this state has held, where it was objected that an instruction similar to the above was improperly given, that the instruction was proper, and have refused to reverse a case for the giving of it. (*Haight v. Vallet*, 89 Cal. 245, [23 Am. St. Rep. 465, 26 Pac. 897].) But similar instructions in other cases have been criticised by our supreme court as an unwarranted interference with the province of the jury, the theory being that to single out a particular class of evidence or the testimony of particular witnesses and tell the jury that it should be examined with great caution might lead the jury to infer that the court had a poor opinion of such evidence. Our attention has not been called to any case where a judgment has been reversed for the refusal to give an instruction of this character. It is clearly intimated in one case (*People v. Barthleman*, 120 Cal. 13, [52 Pac. 112]), that such an instruction ought not to be given, though the court in that case declines to reverse the judgment on account of its having been given. Section 2061 of the Code of Civil Procedure provides for certain cautionary instructions that may be given in proper cases to the jury. It provides, however, for no instruction to the effect that great or any caution should be used in examining expert evidence. Nor does the Code of Civil Procedure anywhere authorize the giving of a cautionary instruction as to expert evidence; and in this condition of the law we think that a case should not be reversed for the refusal to give a cautionary instruction of this character. Indeed, it is held in *People v. Ruiz*, 144 Cal. 251, [77 Pac. 907], and in *People v. Wardrip*, 141 Cal. 229, [74 Pac. 744], that a case should not be

reversed for a refusal to give certain of the cautionary instructions particularly authorized by the subdivisions of said section 2061; and on the authority of those cases it is clear that no material error was committed in the refusal to give the instruction now under discussion.

It is also contended that the court should have given instructions requested by the defendant to the effect that where a party offers weaker and less satisfactory evidence, when it appears that stronger and more satisfactory evidence was within his power, the evidence offered should be viewed with distrust. It was held in the case of *People v. Cuff*, 122 Cal. 591, [55 Pac. 407], that the giving of such an instruction as this in a criminal case was error. In that case *Kauffman v. Maier*, 94 Cal. 283, [29 Pac. 481], was cited, the same principle having been applied there in a civil case as was applied in the case of *People v. Cuff*. In the last-mentioned case it is said: "The danger lurking in these subdivisions of the section is found in the fact that they attempt to deal with the weight and effect of evidence—matters for the jury and not matters for legislative action. The aforesaid section of the code declares that the principles stated in the various subdivisions thereof may be given by the court to the jury upon all *proper occasions*. In criminal cases the proper occasions are so few and the improper occasions are so many that it were best they should be given rarely, if at all." We do not think the present case is one presenting a proper occasion for giving the instruction requested. It appeared that the plaintiff was visited by four different physicians, and that one of these physicians at least, if not more, was in the employ of the defendant. Two of them were merely called in consultation with the physician who had charge of the case. Dr. Jenkins was the attending physician, and he made some fifty visits upon Mrs. Wood during the time that he was treating her for the injuries. He was called as a witness, and we cannot see how his testimony can be said to have been less satisfactory than would have been the evidence of physicians who saw the patient only once or twice, and who undoubtedly received most of the knowledge they possessed concerning the symptoms of her case second-hand from Dr. Jenkins. There was nothing in Dr. Jenkins's evidence, as it appears in the record, that would indicate that anything differ-

ent or more satisfactory might have been obtained from any of the other physicians; and if the defendant had been possessed of any notion that any more satisfactory expert evidence or direct testimony could have been obtained from any of the other three doctors, it was the defendant's privilege to call the same. This is not a case of the suppression of any evidence, as we view it, from the record. Nor is it a case of the offering of weaker and less satisfactory evidence when it appeared that stronger evidence was within the power of the party offering it. So far as we can see, the testimony of the other three doctors was equally "within the power" of both parties, and the instructions requested, if they affected the jury at all, might have been taken as reflecting quite as severely on the defendant as on the plaintiff. We think, however, that as there is nothing to indicate that the testimony of the four doctors added together would have been stronger and more satisfactory than was the testimony of the one attending physician, it would have been idle to give the instructions. We think they were properly refused.

The court, at the request of plaintiffs, instructed the jury as follows: "You are instructed that in reaching a verdict in this case it is your duty, not only to take into consideration all the evidence given by the witnesses and weigh the same with care, but to take into consideration in weighing such evidence and in reaching a conclusion, all of the surrounding circumstances and draw all the inferences from such circumstances and from the testimony of witnesses as may be reasonably drawn."

It is objected that in this instruction the jury were told that it was their duty not only to take into consideration all the evidence given by the witnesses, but also to take into consideration something beyond that and in addition to the evidence. We hardly think the instruction standing alone would bear that construction, but are of opinion that the jury would understand that the court in referring to "the surrounding circumstances" meant only such circumstances as might be developed by the evidence. But be that as it may, the instructions should all be read and construed together. In addition to the instruction complained of, the jury were told that "the existence of each item of injury or damage claimed by the plaintiffs must be shown to a reasonable degree of

certainty by the preponderance of the evidence." They were also told that the law "authorizes you to give such reasonable damages as in your honest and candid judgment you deem the plaintiffs entitled to under the evidence." Listening to these instructions, we think the jury could not fail to understand that their verdict was to be based upon the evidence, and upon that alone.

We see no error in the record, and the judgment and order appealed from are affirmed.

Smith, J., and Allen, J., concurred.

[No. 49. Second Appellate District.—August 26, 1905.]

WATER SUPPLY COMPANY, Respondent, v. L. G. SARNOW, Respondent, and JOSIE E. SULLIVAN, Appellant.

INTERPLEADER—JUDGMENT CREDITOR—GARNISHMENT UNDER EXECUTION—WAIVER OF SUPPLEMENTARY PROCEEDINGS.—Although ordinarily a creditor making a garnishment under execution must first obtain an order under proceedings supplementary to execution before suing the garnishee, yet where the corporation garnishee has filed a bill of interpleader between its judgment creditor and the garnishing creditor, whose judgment is against such judgment creditor, and they have interpleaded, such interpleader is a waiver of the necessity of supplementary proceedings by the garnishing creditor.

Id.—CROSS-COMPLAINT OF GARNISHING CREDITOR.—A cross-complaint of the garnishing creditor in such action is not demurrable on the ground that no order of court was obtained under supplementary proceedings allowing such creditor to sue on the garnishment.

Id.—SUFFICIENCY OF PLEADINGS—GENERAL DEMURRERS—WAIVER OF GROUNDS OF SPECIAL DEMURRER.—Where only general demurrers were interposed to the bill of interpleader and to the cross-complaint, and each was sufficient as against such demurrer, any grounds of special demurrer arising from improper statement are waived.

Id.—EX PARTE ORDER FOR EXECUTION AFTER FIVE YEARS—LIFE OF JUDGMENT—GARNISHMENT.—The court had power to make an *ex parte* order for the issuance of the execution under which the garnishment was made after the lapse of five years from the entry of the judgment and before the expiration of five years and six

months, which would bar an action upon the judgment. An order for the execution is an order for its enforcement, and warrants the garnishment and its enforcement in the interpleader suit.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

T. F. Allen, for Appellant.

Fred E. Borton, for Water Supply Company, Respondent.

George E. Whitaker, Albert M. Johnson, and Hiram W. Johnson, for L. G. Sarnow, Respondent.

ALLEN, J.—The complaint avers that in January, 1902, defendant Sarnow obtained a judgment against plaintiff for \$844; that in May and October following Josie Sullivan caused to be served upon the secretary of plaintiff an execution issued out of a judgment theretofore rendered in her favor and against Sarnow, whereby she sought to levy upon and hold all property or credits in plaintiff's hands due Sarnow; that plaintiff is ignorant of the rights of the parties to the proceeds of said judgment, and would be put to hazard if compelled to judge between the respective claims, and avers that it is willing to pay the full amount of said judgment to whomsoever the court may direct, pending the hearing, with the usual prayer, requiring the interpleader to be discharged, etc.

To this complaint the general demurrer of each of the defendants was overruled; and the defendant Sullivan thereupon filed, as was required, a pleading which she denominated a cross-complaint, in which it is averred that judgment in her favor against Sarnow was rendered in February, 1897, the amount of which, including interest, was at the date of filing said claim, \$742.03; that on May 11, 1902, Sullivan filed in the court in which the judgment was rendered her affidavit, setting out the rendition and non-payment of the judgment; that more than five years had elapsed since the entry, and that Sarnow now has property out of which it could be made. The court, upon presentation of such affi-

davit, made its order that an execution issue, and the same was issued; that on May 20, 1902, the sheriff duly levied on all moneys, debts, and credits of Sarnow in the hands of plaintiff, and that in order to make such levy the sheriff served upon the plaintiff's secretary, and left with him, notice that the same were attached by virtue of said writ; that subsequently the sheriff returned said execution unsatisfied; that when the execution was levied there was \$950.35 in the plaintiff's hands belonging to Sarnow; that afterwards, in October, 1902, another execution was issued out of said judgment so rendered, in favor of Sullivan and against Sarnow, which was duly levied. And the same allegations are set out as were made in reference to the first levy.

To this cross-complaint Sarnow demurred generally, and the same was sustained by the court; and Sullivan not desiring to amend, the court found that Sullivan acquired no rights to the money in the hands of plaintiff by virtue of such levies, that Sarnow was entitled to the money, and by its judgment ordered that plaintiff pay to the clerk the amount of said judgment in favor of Sarnow; that upon such payment the judgment should be satisfied by the clerk, and the money paid to Sarnow. From this judgment against her, and in favor of Sarnow, the defendant Sullivan appeals.

The act of 1895 authorizing the order for execution without notice after the lapse of five years from the rendition of judgment, and before the same is barred by statute, as to all judgments rendered after the passage of such act, is, by our supreme court, in *Harrier v. Bassford*, 145 Cal. 530, [78 Pac. 1038], held to be constitutional. Inasmuch as the only way by which a money judgment may be enforced is by execution, such an order for an execution amounts to an order for its enforcement, and is authorized by section 685 of the Code of Civil Procedure. It is averred in the plaintiff's complaint that a copy of such execution was served, which being admitted, a right and claim as to the money was initiated which would entitle the plaintiff to maintain an action under section 386 of the Code of Civil Procedure.

The cross-complaint alleges that the execution was levied, and, no special demurrer being filed, the same was sufficient.

The essential facts may be improperly or defectively stated, but such defects can only be reached by a special demurrer. (*Grant v. Sheerin*, 84 Cal. 200, [23 Pac. 1094].) The same observations are appropriate as to the general demurrer to the original complaint. The only theory, therefore, upon which the court could have proceeded in its judgment in favor of Sarnow and against Sullivan was that the sections of the act providing for proceedings supplementary to the execution were applicable to this case; and their non-observance destroyed any rights which Sullivan may have acquired to the money or credits in plaintiff's hands. It is true that before any action can be maintained by a judgment creditor on account of a levy made under subdivision 5 of section 542 of the Code of Civil Procedure he shall first proceed, as provided by sections 717-721 of the Code of Civil Procedure, and procure an order authorizing such suit. This, however, is because of the want of privity between the judgment creditor and his debtor's debtor, and the policy of the law is, that the party garnisheed shall have due notice and examination in relation to the subject of the claim against him, and be afforded an opportunity to pay without suit. But in this case the plaintiff voluntarily comes into court as the actor and sues Sullivan and Sarnow. The plaintiff thereby waives all proceedings under said sections and invokes the jurisdiction of the court, and when Sarnow appears in such proceedings he consents to the jurisdiction of the court to hear and determine their conflicting claims to the property; and it would be an idle performance to stay all proceedings in the interpleader suit until Sullivan had taken those steps contemplated by section 717 et seq. of the Code of Civil Procedure, in order that he might establish his right to claim the money. For it certainly could not be contended that a party garnisheed may absolutely destroy the rights acquired under the original levy by instituting a suit under section 383. The levy of the execution gave to Sullivan rights which she might enforce under proceedings supplementary to the execution, and the effect of which would be to defer any claim of Sarnow to such money until these rights had been determined. All parties then appearing, the determination of their respective rights could be had in this proceeding as

effectually as in an original proceeding brought by Sullivan against plaintiff.

The cross-complaint, therefore, as against the general demurrer, was sufficient, and the court erred in sustaining the demurrer thereto.

Judgment is reversed, with directions to overrule the demurrer to the cross-complaint.

Gray, P. J., and Smith, J., concurred.

[No. 186. First Appellate District.—August 28, 1905.]

EDITH M. S. RAINE, Petitioner, v. WILLIAM P. LAWLOR, Judge of the Superior Court of the City and County of San Francisco, Respondent.

ESTATES OF DECEASED PERSONS—SPECIAL ADMINISTRATOR—MODE OF APPOINTMENT.—A special administrator may be appointed either by the court or by the order of the judge at chambers.

ID.—INADVERTENT APPOINTMENT—ABSENCE OF NOTICE UNDER RULE—JURISDICTION TO VACATE—ERROR—PROHIBITION.—The court has jurisdiction to vacate an appointment, if inadvertently made on account of the absence of notice required by a rule of the court; and its jurisdiction to determine the matter includes the power to decide erroneously as well as correctly, and prohibition will not lie to prevent an erroneous order setting aside and revoking the appointment.

ID.—RIGHT OF APPOINTMENT NOT STATUTORY—REAPPLICATION UPON NOTICE.—Even if no appeal lies from an order revoking the appointment of a special administratrix, she cannot be greatly injured, as there is no statutory right in any person to be appointed special administratrix, and she can again apply upon notice and be heard the same as any other applicant if the court should deem it necessary to appoint a special administrator.

PETITION for Writ of Prohibition to William P. Lawlor, Judge of the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Henry C. McPike, for Petitioner.

There is no right of appeal from the threatened order. (*Estate of Calahan*, 60 Cal. 233; *Estate of Dean*, 62 Cal.

613; *Estate of Lutz*, 67 Cal. 457, 8 Pac. 39; *Estate of Sbarboro*, 70 Cal. 147, 11 Pac. 563; *In re Moore*, 86 Cal. 58, 24 Pac. 816; *In re Walkerly*, 94 Cal. 352, 29 Pac. 719; *In re Smith*, 98 Cal. 636, 33 Pac. 744.) There is no policy of the law to prefer the husband as special administrator. Preference is required to be given to the executrix named in the will. (Code Civ. Proc., sec. 1413.) The order was made in open court, and section 937 and decisions under are inapplicable. Inadvertence is not to be presumed, and must be affirmatively shown. (*Carpenter v. Superior Court*, 75 Cal. 598, 19 Pac. 174; *In re Piere*, 1 L. R. Q. B. Div. (1898) 627; 1 Freeman on Judgments, secs. 90, 95, 101.) The facts recited in the decision do not show a case of inadvertence. There being no adequate right of appeal, prohibition is the proper remedy. (16 Ency. of Plead. & Prac., p. 1115; *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119; *Wagner v. Superior Court*, 100 Cal. 360, 34 Pac. 820.)

M. J. Kuhl, Charles W. Slack, and Riordan & Lande, for Respondent.

The decision of the court that the order was inadvertently made is not open to review in this collateral proceeding. (*People v. Curtis*, 113 Cal. 71, 45 Pac. 180.) The court has inherent power to set aside orders and judgments inadvertently made. (*Wiggins v. Superior Court*, 68 Cal. 398, 9 Pac. 646; *Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182, 14 Pac. 686; *People v. Curtis*, 113 Cal. 71, 45 Pac. 180.) The inherent powers have been increased by statute. (Code Civ. Proc., secs. 937, 1713; *Coburn v. Pacific Lumber etc. Co.*, 46 Cal. 33; *In re Sullenberger*, 72 Cal. 549, 14 Pac. 513; *Pignaz v. Burnett*, 119 Cal. 163, 51 Pac. 48.) The court had jurisdiction to decide the question of inadvertence, and if it decided it erroneously prohibition is not the proper remedy. (*Wreden v. Superior Court*, 55 Cal. 505; *Wiggins v. Superior Court*, 68 Cal. 398, 9 Pac. 646.) The surviving husband had the right to notice and hearing. (*Estate of Shiels*, 120 Cal. 348, 52 Pac. 808; *Estate of Dorris*, 93 Cal. 617, 29 Pac. 244.)

COOPER, J.—This is a petition for a writ of prohibition against Hon. William P. Lawlor, as judge of the superior

court of the city and county of San Francisco, to prohibit him from revoking an order appointing petitioner special administratrix of the estate of Inez Sexton Hutton, deceased.

On the second day of May, 1905, an order was made and signed by said judge, appointing petitioner special administratrix of the estate of deceased, and directing that special letters of administration issue to her upon filing a bond and taking the proper oath. Petitioner thereupon qualified and gave the proper bond. It is not necessary to decide the question as to whether the order appointing petitioner was made by the court or by the judge at chambers. In either case the appointment was valid. (Code Civ. Proc., secs. 1411, 1412.)

On the tenth day of May, 1905, H. W. Hutton, the surviving husband of deceased, served and filed a notice of motion to vacate and set aside the order appointing the petitioner such special administratrix, upon the ground, among others, that the order was irregularly and inadvertently made and without notice. The motion came on regularly to be heard on the eleventh day of May, 1905, the petitioner being represented by her attorney, whereupon the court, after due consideration of the matter, concluded that the order appointing the petitioner such special administratrix was irregularly and inadvertently made, without notice as prescribed by the rules of the court, and announced that it would, and it is about to, make an order setting aside and revoking the order appointing petitioner such special administratrix.

The writ of prohibition will not issue to an inferior tribunal unless it is proceeding, or is about to proceed, in excess of its jurisdiction. (Code Civ. Proc., sec. 1102.) The petitioner here accordingly sets forth, "That said order and proceeding is in excess of the jurisdiction of the said William P. Lawlor, as such superior judge, and he is without any jurisdiction to make said order upon any of the grounds stated." Jurisdiction is the power to hear and determine the subject-matter in controversy. If the law confers the power to render a judgment or decree, then the court has jurisdiction. "The question is whether, on the case before a court, its action is judicial or extrajudicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the

power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged and decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." (*Rhode Island v. Massachusetts*, 12 Pet. 657.)

The court or the judge thereof had the power to set aside the order if it was inadvertently made. (*Hall v. Polack*, 42 Cal. 219; *Crim v. Kessing*, 89 Cal. 478, [23 Am. St. Rep. 491, 26 Pac. 1074]; *Kaufman v. Shain*, 111 Cal. 17 [52 Am. St. Rep. 139, 43 Pac. 393].)

Counsel for petitioner concedes that courts have the inherent power to set aside orders inadvertently made, but claims that "when the uncontroverted facts show, as matter of law, that there was no inadvertence the court below has no power to vacate its order on the ground that it was inadvertently made." This is but an argument that the court had the power to decide the matter, provided it decided right, but did not have the power to decide wrong. If it had the power to deny the motion to set aside its order alleged to have been made by inadvertence (and this is conceded) it had the power to grant it. It had the power to determine whether or not the order was inadvertently made. It had the power to decide the matter even if its decision was wrong. It is not necessary to express any opinion as to whether or not the record shows that the order was inadvertently made. If the court arrived at a wrong conclusion it was only error, which cannot be reached in this proceeding. The court was the tribunal, and the judge who heard the matter was the person provided by the laws of the state for passing upon the very question presented. The court below was the sole judge of the evidence and of the question as to whether or not the order had been inadvertently made, and its decision is conclusive as to this collateral proceeding. (*Crim v. Kessing*, 89 Cal. 478, 486, [23 Am. St. Rep. 491, 26 Pac. 1074]; *People v. Curtis*, 113 Cal. 71, [45 Pac. 180].)

The case of *Wiggin v. Superior Court*, 68 Cal. 398, [9 Pac. 646], is directly in point, and supports the views herein expressed. There the court made a decree of final discharge of the administrator. It afterwards, upon application of some of the heirs, made an order setting aside and vacating the decree of final discharge upon the ground that such dis-

charge was "made inadvertently and *ex parte*." A writ of prohibition was sought upon the ground that the court had no jurisdiction to set aside the decree of final discharge. The court said: "We are of opinion that the court had jurisdiction to set aside its order or decree discharging petitioner from his office of administrator, upon the ground that such decree had been inadvertently made and entered, and that having power so to do, if error was committed, it cannot be corrected by means of a writ of prohibition, which only issues to arrest 'the proceedings of any tribunal, corporation, board, or person . . . when such proceedings are without or in excess of the jurisdiction.' "

In *Wreden v. Superior Court*, 55 Cal. 504, it is said: "Any error committed in the decision of a motion can be saved by a bill of exceptions, and be disposed of by appeal, or any other method of review known to the law; but judicial acts, which are the subject of review by these ordinary and adequate remedies, are not the subject of prohibition. The mere fact, if such were the fact, that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction, will not warrant the issuance of a writ of prohibition."

In *Woodward v. Superior Court*, 95 Cal. 276, [30 Pac 535], it was sought by prohibition to arrest proceedings in regard to the appointment of a receiver, on the ground that no sufficient showing had been made to justify the appointment. It is said: "The court had jurisdiction of the subject-matter and of the parties. It had the *power*, therefore, to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction."

It is not necessary to decide in this case whether any appeal lies from the order complained of. If no appeal lies the petitioner cannot be greatly injured. She has no statutory right to be appointed special administratrix. She can again apply upon notice and be heard the same as any one else, if the court should deem it necessary to appoint a special administrator.

The writ is denied.

Harrison, P. J., and Hall, J., concurred.

[No. 16. Second Appellate District.—August 28, 1905.]

WILLIAM RILEY, Appellant, v. LOMA VISTA RANCH COMPANY, W. W. HOWARD, and W. L. RILEY, Respondents.

CORPORATION—PARTNERSHIP—AGENCY—WAREHOUSE RECEIPTS BY SECRETARY TO HIMSELF—RATIFICATION—FINDINGS AGAINST EVIDENCE.—

Where a corporation owning a warehouse is virtually an incorporated partnership, of which its secretary is the managing partner, and he has been in the habit of storing hay in the warehouse and issuing receipts therefor in his own name, signed by the corporation, by himself as secretary, which were regularly entered upon the books and known to the directors, he had authority to issue such receipts to himself; and where it clearly appears that a particular receipt so issued was ratified by the company upon report thereof, and by failure to object thereto upon inquiry of a subsequent assignee thereof for value as to the rate of storage, findings that the corporation did not issue or ratify the receipt are against the evidence.

12.—WAREHOUSE RECEIPT CONCLUSIVE AS TO AMOUNT STORED—ESTOPPEL.—Both under the general law and by force of the statute law of this state it is not competent for a warehouseman to contradict his receipt as to the amount stored; but he is estopped thereby to deny the actual receipt and possession of the goods represented by said receipt.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

James H. Blanchard, and Will D. Gould, for Appellant.

R. H. F. Variel, for Corporation, Respondent.

Curtis D. Wilbur and G. P. Adams, for W. W. Howard, Respondent.

William E. Cox, for W. L. Riley, Respondent.

SMITH, J.—Appeal from a judgment for the defendants and from an order denying plaintiff's motion for a new trial.

The defendant corporation is successor of the firm of Bixby & Howard, composed of Jotham Bixby, the defendant

Howard, and five others, who (excepting one) subscribed for and continued to be the holders of all the stock of the corporation. Howard was manager of the business of the firm before the incorporation, and continued to be such until about the twenty-third day of January, 1897. This suit was brought to recover the value of the balance of the hay undelivered, represented by a warehouse receipt, which is as follows:—

“LOMA VISTA WAREHOUSE.

“No. 172. Howard’s Summit, Los Angeles Co., Cal.

“7-14, 1896.

“Received in Warehouse at Howard’s Summit, on storage, the following merchandise for account of W. W. Howard, at the following rates, one dollar per ton for the season, i. e. July 1-97.

“Not responsible for shrinkage or loss by fire.

“Gangway Numbers.	Lots.	Marks.	No. of Bales.	Weight.	Description.
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“2-4-11	D,	1,	2159	474,691	Oat & Barley Hay.
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“12-13	J,				
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“This receipt must be surrendered and storage paid before delivery of goods will be made. Transfers not complete unless entered in the warehouse books. Storage commences July 1, 1896.

LOMA VISTA RANCH Co.,

Proprietors,

“Per W. W. HOWARD, Sec. & Manager.”

This receipt, it is found, was for the balance of the hay undelivered, represented by a receipt in similar form issued in the year 1895, which had been pledged to the Merchants’ National Bank of Los Angeles as collateral security for the sum of two thousand dollars; and for which the new certificate was substituted. The latter was assigned for value to the defendant W. L. Riley, December 27, 1897, and by him to the plaintiff. Portions of the hay represented by the receipt, aggregating 1,399 bales, were delivered to the defendant W. L. Riley and indorsed on the receipt; and after this delivery the defendant corporation refused to deliver any more hay upon the ground that all the hay of Howard in their possession had been delivered. The assignment of the plaintiff was after this refusal of the defendant corporation, of which the assignee had notice.

It was found by the court that "through omissions, mistakes and oversight, the last-named receipt called for a larger amount of hay than was then actually on storage in said warehouse and barns of the said defendant Loma Vista Ranch Company"; and, in effect, that the hay actually delivered to W. L. Riley was all the hay at that time in the hands of the company; and it is further found, in effect:—

That the defendant corporation never made, issued, or delivered either of said warehouse receipts to W. W. Howard, or subsequently ratified the same, or either of them, and that its officers and directors, other than Howard, did not have any notice or knowledge of the issuance of such receipts until after the resignation of Howard; and that at the time of the assignment of the receipt to W. L. Riley the latter knew that the said Howard had been in fact the secretary and manager of the corporation defendant, and in charge of its business and warehouse at the time the receipt was issued, and purchased the receipt and hay represented thereby "with notice that the said Howard had issued said receipt in the name of said corporation by himself, as secretary and manager thereof, to himself in his individual capacity, without authority so to do, and with constructive notice that said receipt as against said corporation defendant called for more hay than said corporation defendant had received or had then in its possession or warehouse."

But these findings are attacked by the specifications of the appellant, and from the evidence in the case the following facts appear without contradiction: Previously to the issue of the receipt sued upon, Howard had been in the habit of storing hay in the warehouse of the defendant corporation and issuing receipts to himself therefor, which were regularly entered in the books of the company and known to its directors, or some of them; and from the minutes of the corporation it appears that in the report of Howard as secretary, made on the twenty-third day of January, 1897, this particular receipt is referred to, and that at the next subsequent meeting the minutes of the preceding meeting, showing the financial statement and annual account of Howard, were read and the minutes of the meeting approved, the minutes showing no objection made to the receipt in question. And, again, at the stockholders' meeting of June 27, 1898,

all the official acts of the board of directors of the corporation during the year were approved, ratified, and confirmed. It also appears from the evidence of William Riley that before completing his purchase of the certificate and the hay represented thereby he went to the company's office and inquired of the officers there present how much the charge of storage against the hay was, and was informed that they had made arrangements with Mr. Howard and that it would be a dollar and a half a ton, if the hay was taken away within three months, and that none of the officers said anything "about any suspicion of the warehouse receipt in any way." This evidence is confirmed by the witness Rawson, who succeeded Howard as manager, and was one of the officers applied to.

Upon this evidence, which was uncontradicted, we think it clear that Howard had authority to issue receipts to himself, and that this particular receipt was ratified by the company upon its receipt of Howard's report and its failure to make any objection to the receipt upon the occasion of Riley's inquiry as to the rate of storage. (*Phillips v. Sanger Lumber Co.*, 130 Cal. 432, [62 Pac. 749].) And this view of the case is confirmed by the character of the incorporation—which was that of an incorporated partnership—of which Howard had been the manager and one of the principal partners. (*Shorb v. Beaudry*, 56 Cal. 450.) We are of the opinion, therefore, that the findings objected to were not justified by the evidence.

It remains to consider whether it was competent for the defendant corporation to contradict its receipt as to the amount of hay represented by it, and on this point we are of the opinion that it could not. By the first section of the act of April 1, 1878, (Civ. Code, p. 779, [Stats. 1877-8, p. 949],) a warehouseman is forbidden to issue a receipt for goods that have not been *bona fide* received into store by such warehouseman, or which are not in store and under his control at the time of issuing the receipt; and by section 10 a violation of this or other provision of the act is made a felony. And by section 6 it is provided, with reference to negotiable receipts (of which this is one), that a warehouseman shall not "be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt or receipts issued for the same, when called upon to deliver said goods," etc.

By the provisions of the act, therefore, a warehouseman is estopped to deny the actual receipt and possession of the goods "represented by said receipt"; which seems to be in accordance with the general law. (*Hanover Nat. Bank v. American Dock etc. Co.*, 148 N. Y. 612, [51 Am. St. Rep. 721, 43 N. E. 72, and cases cited].) The case cited is very similar to the case before us on both of the points involved.

We are of the opinion that the judgment and order appealed from must be reversed, and it is so ordered.

Gray, P. J., and Allen, J., concurred.

[No. 50. Second Appellate District.—August 23, 1905.]

H. S. GRINNELL, Appellant, v. JOHN S. HILL, &c
Respondent.

ACTION UPON NOTE—PURCHASE OF OIL STOCK—DEFENSE—RESCISSION FOR FRAUD.—In an action upon a note given on account of the purchase price of oil stock an answer setting forth that the defendant, having friendly relations with the plaintiff, was induced by his fraudulent representations, specifically set forth, to purchase the stock and to give the note sued upon, and setting forth a case of aggravated fraud, and prompt notice of rescission of the contract therefor upon discovery of the fraud, with demand for return of the note, discloses a complete defense to the action.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Stearns & Swett, for Appellant.

M. L. Ward, for Respondent.

SMITH, J.—This is a suit upon a promissory note of date December 27, 1900, for the sum of \$625, given for twenty-five hundred shares of Famosa Oil and Investment Company.

In the answer, besides the allegations as to the familiar and friendly, if not confidential, relations existing between the parties, it is alleged that the defendant was induced to purchase the stock, and to give the note sued on, by certain fraudulent representations, set forth specifically in the answer, which were, in effect: 1. That the plaintiff represented to the defendant that he had purchased five thousand shares of the stock referred to in the note at twenty-five cents a share, which was less than its market value, and that, on account of the friendly relations existing between them, he was willing to let the defendant have one half of the stock purchased at the price he had paid for it; 2. That the plaintiff had in fact purchased the stock at the price of ten cents a share, which was its full market value; 3. That the defendant saying that he had not the money to invest, the plaintiff proposed to him to give his note, representing to him that the stock could not be issued prior to about the fifteenth day of September, 1901, at which time the plaintiff, if the defendant should so elect, would return the note to him and have the stock issued to himself; and 4. That about the first day of July, 1901, the defendant having discovered the falsity of the plaintiff's representations, rescinded the contract and demanded the return of the note, which the plaintiff refused to return. There was ample evidence to sustain all of the facts alleged.

The case was tried by a jury, who returned a verdict for the defendant, and the plaintiff appeals from the judgment thereon entered, and from an order denying his motion for a new trial.

Numerous points are urged by the appellant for the reversal of the judgment and the order appealed from. But they may be all summed up in the general proposition that the facts above alleged do not constitute a defense to the action. But the contention is too obviously untenable to require serious consideration—the case being, in our opinion, one of aggravated fraud. (Civ. Code, sec. 1572; *Dow v. Swain*, 125 Cal. 674, [58 Pac. 271]; *Langley v. Rodriguez*, 122 Cal. 580, [68 Am. St. Rep. 70, 55 Pac. 406].)

The judgment and order appealed from are affirmed.

Allen, J., and Gray, P. J., concurred.

[No. 9. First Appellate District.—August 29, 1905.]

MARGARET J. NICOLS, Appellant, v. BOARD OF
POLICE PENSION FUND COMMISSIONERS, etc.,
Respondents.

POLICE PENSION FUND—TRUST—CLAIM OF WIDOW—RUNNING OF STATUTE OF LIMITATIONS.—The police pension fund authorized by the act of March 4, 1889, is not characterized in any of the provisions for its creation or management with the elements of a trust; and the statute of limitations begins to run against the claim of a widow of a deceased police officer from the date of his death, and where she failed for more than five years thereafter to present her claim it is barred by the statute of limitations.

ID.—TIME FOR PRESENTATION OF CLAIM.—It is not an unreasonable inference from the provision of section 14 of the act that on the last day of June of each year all surplus of said fund exceeding the average amount per year paid out on account thereof during the three years next preceding should be transferred to and become part of the general fund of the city and county and "no longer under the control of the board or subject to its order," that it was the intention of the legislature that all claims against the fund should be presented within one year after the right to receive such payment had accrued.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

William M. Madden, for Appellant.

Percy V. Long, City and County Attorney, for Respondents.

HARRISON, P. J.—Mandata.

The petitioner alleges that Watson Nicols, now deceased, was appointed a police officer and member of the police department of the city and county of San Francisco June 9, 1871, and from that time continuously and duly served as a regular officer in active service in said department until he was retired from active service as hereinafter stated, and was a member of the said police department continuously from the time of said retirement until his death; that in Sep-

tember, 1889, while serving as a policeman in said city and county, he became physically disabled while in, and in consequence of, the performance of his duty as such policeman, and that on September 30, 1889, the defendants, under and in pursuance of the provisions of the act of March 4, 1889, (Stats. 1889, p. 56), duly and regularly retired him from active service, and placed him upon the police relief and pension-roll of said police department, and granted him a pension from the police relief and pension fund created under the provisions of said act, of \$57.50 per month from the first day of October, 1889, and that he received the said pension from that time until his death; that the petitioner and the said Watson Nicols intermarried July 17, 1883, and from that date continuously to the time of his death were husband and wife; that said Watson Nicols died in the city and county of San Francisco January 29, 1890, from natural causes, leaving the petitioner as his surviving widow; that as his widow she is entitled under the provisions of the aforesaid act of March 4, 1889, to the sum of one thousand dollars from the aforesaid police relief and pension fund; that on March 22, 1895, she presented to the defendants her claim as the widow of said Watson Nicols for said sum of one thousand dollars, and demanded of the defendants that they order the same paid to her out of said pension fund, and issue a warrant to her therefor; that the defendants refused and still refuse so to do. Wherefore she asked the superior court to issue a peremptory writ of mandate, requiring the defendants to comply with her said demand. Her petition therefor was filed in the superior court July 10, 1895. To this petition the defendants demurred, specifying among other grounds of demurrer, that her cause of action is barred by the statute of limitations. The court sustained the demurrer and ordered the proceeding dismissed, and from the judgment entered thereon the petitioner has appealed.

The provision in the act of March 4, 1889, upon which the appellant relies for recovery, is as follows, viz. :—

“Sec. 7. Whenever any member of the police department of such county, city and county, city or town shall, after ten years and less than twenty years of service, die from natural causes *then* his widow or children, or if there be no widow or children *then* his mother or unmarried sisters, shall be

entitled to the sum of one thousand dollars from such fund." (Stats. 1889, p. 57.)

As the plaintiff did not commence the present action until more than five years after the death of her husband, it is evident that her right of recovery is barred by the statute of limitations unless for some reason it is taken out of the operation of the statute. It is therefore contended on her behalf that under the terms of the aforesaid act the pension fund thereby created is held by the defendants under an express trust in favor of those for whom it is created; and consequently that the statute of limitations did not begin to run against her claim until a repudiation of the trust on the part of the defendants. This contention is based upon the proposition that by the terms of the act the defendants are constituted a "board of trustees," and those for whose benefit the fund is authorized are styled "beneficiaries."

We are unable to accept this construction of the act. Whether a fund created for the benefit of certain designated persons is impressed with a trust which can be enforced in their favor will depend upon the terms under which it is created and the provisions made with reference to its disbursement rather than upon the designation given to the disbursing agents or to the recipients of the fund. The "pension fund" authorized by the act is not characterized in any of the provisions for its creation and management with the elements of a trust, and the mere designation of those who are to disburse it as a "board of trustees," and those for whom it is to be distributed as "beneficiaries," is insufficient to require such construction. Persons invested with the management or control of a fund may be styled a "board of trustees" without holding any relation of trust to the fund other than such as exists in all cases where one person has the management or control of property belonging to another; and any person who derives an advantage from the beneficence of another is with equal propriety styled a "beneficiary," as one for whose benefit a trust is created.

The defendants are not made the custodian of the pension fund, but have been appointed by the legislature to ascertain and designate the persons who are entitled to the payments authorized by the act, and in so doing are in the exercise of a public duty imposed upon them by the legislature. The legis-

lature has directed that certain public moneys shall be set apart in the treasury for the purpose of making these payments; and the moneys so set apart are at all times public moneys in the custody of the treasurer of the county. The "two dollars per month" which the petitioner alleges was retained by the treasurer from Nicols' pay as a member of the police department, and paid into said fund, was not a contribution to the fund by Nicols, but, as was said in reference to a similar provision in the act of 1878, in *Pennie v. Reis*, 132 U. S. 464, "was money of the state retained in its possession for the creation of this very fund." In this case the supreme court of the United States, in construing the act, held that a member of the police department has no vested right or right of property in the money authorized by the act to be paid upon certain contingencies or the happening of certain events until such contingencies or events shall occur; thus refuting the proposition that the fund is held under an express trust in favor of the designated beneficiaries. The provision of section 14 of the act, that on the last day of June of each year all surplus of said fund exceeding the average amount per year paid out on account of the said fund during the three years next preceding shall be transferred to and become a part of the general fund of the city and county, and "no longer under the control of said board or subject to its order," is a direction of the legislature for the disposition of the fund, and is inconsistent with the proposition that it is held by the board under an express trust in behalf of those to whom it is to be paid. It is not an unreasonable inference from this provision of the act that it was the intention of the legislature that all claims against the fund should be presented for payment within one year after the right to receive such payment had accrued.

The relation of the petitioner to the fund is not unlike that which exists in behalf of a beneficiary under the provisions governing a benevolent or fraternal association. Upon the happening of the event at which such beneficiary is entitled to receive the benefit provided in the articles of association a right of action accrues in his behalf, which, like any other right of action, must be enforced within the period provided by the statute of limitations. (*Kauz v. Great Council etc.*,

13 Mo. App. 341.) It would not be seriously contended that if Nicols had neglected to seek payment of his monthly pension for more than five years after his right to it had accrued his right would not be barred by the statute of limitations. The act, however, makes no distinction between the different classes of beneficiaries in relation to the fund, and it must be held that the petitioner's right of recovery was barred by the statute of limitations.

The judgment is affirmed.

Cooper, J., and Hall, J., concurred.

[No. 57. Second Appellate District.—August 30, 1905.]

M. R. MADARY, Respondent, v. S. G. SMARTT et al.
Defendants; KERN VALLEY BANK, Appellant.

MECHANICS' LIENS—WAIVER OF DEFECT IN COMPLAINT.—A defect in the complaint in an action to foreclose a mechanic's lien, in not alleging that the materials contracted for were actually used in the building, is waived where the defendant's counsel made a statement to the court limiting his objection to evidence solely to insufficiency in the form of the lien and practically allowed the plaintiff to prove the fact of use without amendment in that regard; and the defendant cannot be permitted upon appeal to urge an objection to the complaint in that regard which might have been obviated by a timely amendment.

ID.—SUFFICIENCY OF LIEN.—Where the complaint shows that the claim of lien stated all the matters required by section 1187 of the Code of Civil Procedure, and was filed in due time, it shows that a lien attached; and it is of little consequence whether the claimant styles it a claim of lien or a claim of benefit under the lien law.

ID.—LIEN UPON COUNTER AND PARTITIONS—ADDITIONS TO BUILDING—PERMANENT FIXTURES—SUPPORT OF FINDING.—The lien was properly claimed upon a counter and partitions which were added to the building where they were shown to be such additions as amounted to a "repair and alteration" of the building, and the evidence was sufficient to support a finding that they were permanently attached to the building and became part thereof.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Smith & Allen, for Appellant.

George W. Whitaker, and Fred E. Borton, for Respondent.

ALLEN, J.—Action to foreclose a mechanic's lien. Judgment and decree for plaintiff. From the judgment and an order denying a new trial the defendant Kern Valley Bank appeals.

The first question presented upon the appeal is as to the sufficiency of the complaint. The complaint sets out an agreement between the lessee of the owner and the contractor, by which the latter agrees to furnish all the material and labor and to make certain alterations and repairs to a building. It further alleges that he fully completed all of the work agreed to be done. Following this, it is alleged that plaintiff entered into an agreement with said contractor, whereby he agreed to and contracted to furnish him certain specified materials, which were to be used in making such alterations and repairs, and which alterations and repairs were made with the knowledge of the owners. A copy of the lien filed of record is incorporated in the complaint, and, after the usual and ordinary statements, concludes as follows: "Wherefore said M. R. Madary claims the benefit of the law relative to liens of mechanics and others upon real property as found in the Code of Civil Procedure of the state of California."

It must be conceded that nowhere in the complaint is found the necessary allegation that the materials were actually used in the building, yet, in view of the conduct of all parties at the trial, such omission becomes unimportant. The transcript shows that the demurrer to the complaint was overruled by consent; that upon the trial, when plaintiff offered his testimony, counsel for defendant bank objected to the introduction thereof, and in such objection stated that it was "on the ground that the complaint does not state facts sufficient to constitute a cause of action. In other words, that the pleadings do not show that there has been any declaration of lien filed in the office of the county recorder, as required by law. I object to the introduction of any testimony with the view to prevent a lien being declared

against the Arlington Hotel, and a decree of foreclosure ordered." Further along, before the court passed upon the objection, counsel for the bank said: "There are only two propositions I care about in this matter. We deny that they are entitled to a lien to a partition that is mentioned in the complaint, and to the counter, and I am satisfied to try those two questions; to take the testimony upon those two matters and submit the case. Let the objection stand to all the material, and you may prove that the material set forth in here was furnished." This statement to the court could have had no other effect than to assure plaintiff and his counsel that no question would be raised on account of any defect in the complaint other than as to the form of lien; that they might prove the fact of use without any amendment in that regard. And to permit the defendant now to raise any objection to the complaint which might have been obviated by a timely amendment would be unfair.

The only question, therefore, presented by the exception is as to the sufficiency of the lien set out in the complaint. Section 1187 of the Code of Civil Procedure provides specifically what matters and things are essential to be stated in a claim of lien, all of which appear in this lien. Having stated those matters and filed the same in due time, the lien attaches. It is a claim upon its face, and a claim is all he is required to verify and file; and it is of little consequence whether the claimant styles it a claim of lien or a claim of benefit under the lien law.

The defendant next contends that the counter and partitions were neither alteration nor repairs, but additions. Let this be conceded. They were shown to be such additions as amounted to a repair and alteration of the building, and therefore properly styled repairs and alterations. Whether they were permanent in their character and became part of the structure by the manner of construction was for the trial court to say under the evidence, and there was evidence sufficient to warrant the court in its finding that they were permanently attached to the building and became a part thereof.

We find no error in the record, and the judgment and order are affirmed.

Gray, P. J., and Smith, J., concurred.

[Crim. No. 8. First Appellate District.—August 30, 1905.]

THE PEOPLE, Respondent, v. MARTHA E. BOWERS, Appellant.

CRIMINAL LAW—MURDER—APPEAL—SUFFICIENCY OF EVIDENCE—CONFILOT.—Upon appeal from a conviction of murder, committed by a wife in the killing of her husband, where there is simply a conflict of evidence upon the question as to whether or not the defendant is guilty, this court cannot interfere with the verdict of the jury and the determination of the trial court thereon on motion for new trial.

Id.—EVIDENCE—SYMPTOMS OF ARSENICAL POISONING—CONDITION OF CLOTHING AND BED-LINEN.—Where there is testimony that deceased was affected with such purging and vomiting as were symptoms of arsenical poisoning, evidence that the clothing and bed-linen used by the deceased during his illness shortly before his death were in a dirty and much soiled condition was properly admitted as corroborative of the testimony as to such symptoms, and also to support an inference that defendant as his wife was not as kind and considerate toward her husband as her conduct in the presence of witnesses would indicate.

Id.—EVIDENCE OF MOTIVE—INTIMACY OF DEFENDANT WITH ANOTHER MAN.—It was proper to admit evidence to show that defendant and another man had intimate relations with each other and were lovers, as tending to show a motive of the defendant for desiring the death of her husband.

Id.—CROSS-EXAMINATION OF MEDICAL EXPERT—QUESTION FRAMED FROM BOOK.—Where on the cross-examination of a medical expert a question framed by the district attorney was objected to on the ground that he was reading from a medical book, whereupon he declared that he made the question his own, and, apart from the objection, it does not appear that the jury could have known that he was reading from any book, actual or reversible error does not appear, though the course adopted by the district attorney is not to be commended.

Id.—QUALIFICATION OF MEDICAL EXPERT—PROPER HYPOTHETICAL QUESTION.—Where the record sufficiently shows the qualification of a medical expert, and a hypothetical question put to him embodied facts assumed which might fairly be inferred from the evidence, there was no assumption of the province of the jury in such question.

Id.—PROCURING OF POISON—PRESCRIPTION FORGED BY DEFENDANT—AGENCY OF SISTER.—Evidence was admissible to show by a druggist that a sister of defendant procured an ounce of arsenic on a prescription signed with the name of a physician, where, regardless of the character of the agency of the sister, it was shown that

the prescription was a forged one in defendant's handwriting and on paper torn from a book belonging to her and in her possession, and that four grains of arsenic were found in her husband's stomach five days after the arsenic was procured, she having been in sole attendance upon him thereafter to the day on which he died.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

C. W. Lynch, F. G. Drury, Lynch & Drury, H. J. McIsaac, and Coldwell & Borland, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

HALL, J.—Defendant was convicted of the crime of murder in the first degree for the killing of her husband, and was sentenced in accordance with the verdict to imprisonment for life. This is an appeal from the judgment and from the order denying her motion for a new trial.

The first point urged as ground for a reversal of the judgment and order is that the evidence was insufficient to sustain the verdict.

In cases where there is simply a conflict of evidence on the question as to whether or not the defendant is guilty, this court cannot interfere with the verdict of the jury and the determination of the trial court thereon on motion for a new trial. (*People v. Buckley*, 143 Cal. 375, [77 Pac. 169]; *People v. Fitzgerald*, 138 Cal. 40, [70 Pac. 1014]; *People v. Donnolly*, 143 Cal. 394, [77 Pac. 177].)

In *People v. Gonzales*, 143 Cal. 605, [77 Pac. 448], the rule is laid down thus: "This court cannot interfere with the verdict of a jury, nor with the action of the court below in refusing a new trial, on the ground that the evidence is insufficient to justify the verdict, unless there was such a lack of evidence as to satisfy us that the court below abused its discretion in denying the new trial.

In the case now before the court the evidence is largely circumstantial, and is set forth in four hundred and eighty-eight pages of the transcript. No good purpose will be sub-

served by discussing in detail the evidence. Such a discussion would necessarily be an argument as to what inferences should or could be drawn from the evidence. Suffice it to say that after a careful examination of the evidence in the transcript we are of the opinion that under the rules above set forth the contention of appellant on this point cannot be sustained. The evidence was sufficient to sustain the verdict, and the court did not err so far as this point is concerned in denying the motion for a new trial.

It is next urged that the court erred in admitting, over the objection of the defendant, testimony to the effect that the clothing and bed-linen used by deceased during his illness shortly before his death were in a dirty and much soiled condition.

This testimony was clearly proper. It tended to corroborate other testimony to the effect that deceased was afflicted with purging and vomiting, symptoms, as the evidence showed, of arsenical poisoning, from which it was claimed that deceased died. One of the witnesses testified that the soiling of the bed-sheets was the result of vomiting and purging. Prior to the introduction of the evidence complained of defendant had drawn out testimony to the effect that during the illness of deceased, which lasted upwards of two months, defendant had appeared, at least in the presence of the witness, to be kind and attentive to the comfort of her husband. From the condition of the bed-linen, etc., inferences might well be drawn that defendant was not really anxious for the comfort or recovery of her husband, as her conduct in the presence of witnesses would indicate.

It is contended that the court erred in admitting, over the objections of defendant, evidence that defendant and one Lervy had, before the death of deceased, visited and drank together in certain saloons; that on one occasion she had sat on Lervy's lap, and they had kissed each other, and placed their arms around each other while so doing; and that on the night of the day on which deceased died and the following night she and Lervy slept in the same room. It cannot be denied that evidence of the existence or want of a motive for the commission of any particular crime is often of much importance in determining whether or not the defendant

committed the crime charged. Especially is this so in cases depending on circumstantial evidence such as this was. Indeed, the defendant procured the court to substantially so instruct the jury. The testimony now under discussion, taken as a whole, tended to show that Mrs. Bowers and Lervy were lovers. Some of it standing alone might be said to be too remote and inconsequential to furnish any such inference, but it should all be considered. Proof that they were lovers furnished a motive why defendant might desire the death of her husband. The evidence was properly admitted.

It is also contended that the court erred in permitting the district attorney, over the objection of defendant, "to read on cross-examination of witness Dr. Stephens extracts from medical works, and to ask the witness whether what was so read corresponded with his own judgment." The witness had given testimony as to the symptoms and effects of arsenical poisoning, and following such testimony the transcript contains the following:—

"Q. Is this a correct statement, doctor: While the poison is being eliminated, the process which begins very soon after it is taken, it generally causes fatty degeneration of the liver, heart, and kidneys, the symptoms of which are often very prominent?

"*Mr. Drury.*—We object to the question as incompetent, irrelevant and immaterial, improper and hearsay. It appears that the district attorney is reading from certain medical books and asking this witness questions therefrom.

"*Mr. Byington.*—I am making it my own question, if your honor please.

"*The Court.*—Objection overruled; to which ruling of the court defendant then and there duly excepted."

It will thus be seen that except for the statement of the attorney for defendant the transcript does not show that the jury could have known that the district attorney was in fact reading from a medical book, or from any book. He had not so stated, and so far as we can see from the transcript the book, if in fact he was reading his question from a book, was entirely out of sight of the jury.

On the objection being made, the district attorney said, "I am making it my own question." which in fact it was in form.

It was held in *Lilley v. Parkinson*, 91 Cal. 655, [27 Pac. 1091], that it is not competent, upon the examination of medical witnesses, to read to them extracts from medical works and ask them whether what is so read corresponds with their own judgment, when it is apparent that the sole object of so doing is to place before the jury the opinion of the author of the books referred to. In the case just cited extracts were read from a book shown to be a standard work on surgery and witnesses asked if what was read corresponded with their own judgment, and the court said, "The only effect of these questions and answers was to place before the jury the opinion of the author of the book referred to, and it is also apparent that this was the object sought." But from the record before us we cannot say that the rule laid down in *Lilley v. Parkinson* was violated. While the course adopted by the district attorney cannot be commended, we do not think it justifies a reversal, or that actual error has been shown.

Defendant urges that the court erred "in permitting Dr. McLaughlin, a witness for the prosecution, to testify as an expert without it being shown, first, that he was a regularly graduated and licensed physician of any medical school; and, second, that he was an expert in the general subject under discussion." The objection as it appears in the transcript was to a long hypothetical question, and was thus stated: "We object to that question on the ground that no proper foundation has been laid, and upon the ground that it is not based upon the facts presented, also upon the ground that it is incompetent, and inasmuch as it assumes the province of the jury."

The witness had testified that he was and had been a physician and surgeon for several years past, and had already given testimony without objection as an expert and along medical lines, covering in narrative form four and a half pages of the transcript. Under these circumstances we do not think that the objection was either well taken, or was in fact pointed at the matter now urged as the ground of objection.

The objection to the hypothetical question put to Dr. Harrison was properly overruled. We think that the facts as-

sumed in the question might fairly be inferred from the evidence in the case.

It is lastly urged that the court erred in allowing the prosecution to introduce certain testimony of one Mr. Peterson, a druggist, to the effect that one Mrs. Sutton presented to him, August 20, 1903, a certain prescription for arsenic, signed "McLaughlin, M. D.," and that he gave her thereon an ounce of arsenic,—that is to say, an ounce of arsenious acid.

The contention of defendant on this point is without merit. About four grains of arsenious acid were found in the stomach of deceased after his death, which occurred five days subsequent to the getting of the arsenic. Mrs. Sutton was the sister of defendant; the prescription was in the handwriting of defendant, and on paper torn from a book belonging to her and in her possession; defendant was in sole attendance on deceased from August 20th to his removal to the hospital on the day of his death. These facts sufficiently connected Mrs. Bowers with the getting of the arsenic to allow of the introduction of this evidence. Whether Mrs. Sutton was a co-conspirator of Mrs. Bowers or simply her innocent agent, the fact that the prescription on which the arsenic was obtained was forged by Mrs. Bowers sufficiently connects her with the obtaining of the arsenic to allow of the proof of the getting of the same.

After an examination of all the points urged by the defendant as ground for a reversal we have found no error in the record.

Judgment and order are affirmed.

Cooper, J., and Harrison, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on October 11, 1905.

[Crim. No. 11. First Appellate District.—August 30, 1905.]

THE PEOPLE, Respondent, v. **CHRISTOPHER FITZGERALD**, Appellant.

CRIMINAL LAW—MURDER—SUFFICIENCY OF EVIDENCE.—Upon review of the evidence, held that it is sufficient to sustain a verdict of guilty of murder in the second degree, and to show that the killing was wholly unnecessary, in shooting an unarmed man in an intoxicated condition, and not in necessary self-defense.

Id.—INADMISSIBLE EVIDENCE—DECLARATION OF DECEASED TO HIS WIFE.—Where it appeared that prior to the homicide the wife of deceased was trying to get him away, evidence of what he said to her was properly excluded, there being no intimation in the question as to the nature of the statement sought to be elicited.

Id.—APPREHENSION OF BODILY INJURY—INAPPLICABLE INSTRUCTION—STRENGTH AND ACTIVITY OF PARTIES.—Where there was no evidence as to the relative size, strength, and activity of the parties an instruction that the jury should take the same into consideration in determining whether the defendant had reason to apprehend bodily injury from the defendant was properly refused; and error cannot appear in refusing it where the record does not show that it was requested by the defendant.

Id.—NEWLY DISCOVERED EVIDENCE—INSUFFICIENT AFFIDAVITS.—Affidavits of newly discovered evidence which are not shown in the record to have been offered or read on the motion for a new trial, and the contents of which would not justify a new trial, being designed merely to impeach a witness for the prosecution on a point which might have been fully shown at the trial, are insufficient to justify a new trial.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial George E. Church, Judge.

The facts are stated in the opinion of the court.

E. D. Edwards, and E. A. Williams, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

COOPER, J.—Defendant was tried upon the charge of murder in killing with malice aforethought one Charles Slater on the eighteenth day of September, 1904.

The jury returned a verdict of murder in the second degree. Defendant made a motion for a new trial, which was

denied, and judgment was entered directing that he be imprisoned for ten years in the state prison at Folsom. This appeal is from the judgment and order denying a new trial.

The main contention of appellant is that the evidence does not support the verdict. The evidence shows that deceased and defendant were fellow-laborers at McKenzie's mill in Fresno County at the time of the homicide. There had been no previous trouble between them, and they had been on friendly terms prior to the killing. On Sunday morning, the day of the homicide, deceased had been drinking, but appears to have been in a humorous mood and trying to entertain his companions in various ways. He was telling stories, joking, scuffling with his fellow-laborers, and pretending to auction off the property of every one. He had torn the mosquito netting off defendant's bed, and had his feet up on the bed. Defendant requested him to take his feet off his bed, and deceased appears to have complied with the request. Defendant then, with the assistance of one Klepper, removed the bed some distance away. Up to this time no angry words were used by either party. After this, while deceased was being shaved, his chair either fell or was pushed over by some of the boys, and he rolled upon the ground. He appears to have been lying on the ground telling a humorous story when defendant passed. Deceased arose and ran after him, overtaking him, and pushed or struck him, after which he returned and wrestled with one Lewis.

While the manner of deceased was rough and boisterous, he appears to have been good-natured and to have been more in play than otherwise. Defendant appears, however, to have become impatient and angry because of the annoyances to which he was subjected and the acts and conduct of deceased. In his own language he states: "I then went on in the Barnes cabin and started to shave outside by the door; then I saw Klepper and several of the boys taking Slater away, and he tried to get away from Klepper, but they took him down to his own house. I then went back to the Long cabin, got my rifle, loaded it and said, 'If he don't let me alone I will put a half ounce of lead in him; if he wants a shooting scrape he can get it.' I then went into the Barnes cabin with the rifle, laid it down in the northwest corner of the cabin and went outside and commenced shaving." De-

ceased almost immediately afterwards came up unarmed, in an intoxicated condition, to defendant's cabin. Defendant went inside, deceased following after him, and defendant said twice in rapid succession, "Get out of here," and simultaneously raised the rifle, which he had loaded for the purpose, and fired the bullet which passed through the body of deceased, causing almost instant death. Deceased exclaimed with his last breath, "My God, boys, what did he do that for!"

The shooting appears to have been wholly unnecessary. Defendant had prepared the deadly rifle, and, not in necessary self-defense, he fired the shot at an unarmed man in an intoxicated condition. The jury, in its mercy, gave the defendant the benefit of his condition of mind caused by the annoyances to which he had been subjected. It reduced the degree, and thus in effect found that the killing was not willful, deliberate, and premeditated. The judge also appears to have dealt leniently with the defendant.

The evidence fully supports the verdict.

The witness Watson testified to the effect that a short time before the homicide deceased was between two of the cabins, and his wife was trying to get him away. The defendant's counsel then asked the witness the following question: "At the time Mrs. Slater was there, what, if any, statement was made by Mr. Slater to Mrs. Slater?" The court correctly sustained an objection to the question. It does not appear that any statement was made, and no intimation is made in the question as to the nature of the statement sought to be elicited. If the statement was made, and was as to some matter not connected with the homicide, it was clearly inadmissible.

The court refused to instruct the jury: "In determining whether the defendant had reason to apprehend that he was about to receive bodily injury from the deceased at the time the fatal shot was fired, the jury may take into consideration the relative size, strength, and activity of the respective parties." There was no evidence in the record as to the relative strength and activity of the parties. Not only this, but the record does not show that the instruction was requested by defendant.

The last contention of defendant is that the court erred in denying his motion for a new trial on the ground of newly discovered evidence. We find certain affidavits in the record, but there is not a word showing or tending to show that they were offered or read by defendant on his motion for a new trial. But we have examined them and find nothing that would have justified the court in granting a new trial on this ground. They are all to the point that defendant has discovered evidence which would tend to impeach the witness Michael Fitzgerald (who testified for the prosecution), by showing that at the time of the homicide Fitzgerald was intoxicated to such an extent that he could not have known the facts concerning the homicide. The defendant's counsel, in cross-examination of the witness Fitzgerald, asked him if he had been drinking that morning, and the witness answered, "Nothing but coffee." If it was true that the witness was intoxicated to such an extent as to affect his credibility it could easily have been shown at the trial. There were many parties present at the homicide and who testified. Defendant called some of them, among whom was Michael Fitzgerald, the witness sought to be impeached. It is said in *People v. Warren*, 130 Cal. 685, [63 Pac. 86]: "A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor, and the party who relies upon such ground must make a strong case, both in respect to diligence on his part and as to the truth and materiality of the evidence; and if he fails in either respect his motion must be denied."

The judgment and order are affirmed.

Hall, J., and Harrison, P. J., concurred.

[No. 70. Second Appellate District.—August 30, 1905.]

TERRACE WATER COMPANY, Respondent, v. SAN ANTONIO LIGHT AND POWER COMPANY et al., Appellants.

CONTRACT TO SELL ELECTRIC POWER—PERSONAL PROPERTY—PRICE NOT PAID—MEASURE OF DAMAGES.—A contract to sell electric power for five years is a valid contract to sell personal property, and where the price is not paid in advance the measure of damages for breach of the contract is the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled.

ID.—PLEADING—ADMISSIBILITY OF EVIDENCE—PRESUMED NOTICE OF LEGAL DAMAGES—MINIMUM DAMAGES.—Damages resulting from the act complained may be proved under the *ad damnum* clause of the complaint. The defendant must be presumed to be aware of the damages fixed by law for the violation of his contract, and where no special damages were claimed or allowed the court properly allowed the minimum of damages resulting from the procurement from another at a higher price of what the defendant had failed to deliver at the stipulated price.

ID.—ESTOPPEL OF DEFAULTING PARTY.—The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and his outlay fairly incurred.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Otis, Gregg & Surr, for Appellants.

E. R. Annable, and H. M. Willis, for Respondent.

ALLEN, J.—This action is based upon an alleged breach of contract entered into between plaintiff and defendants, in which findings and judgment went for plaintiff. This appeal is by defendants from the judgment supported by a bill of exceptions.

The defendant corporation on March 19, 1898, entered into an agreement in writing by which it obligated itself to furnish and deliver to plaintiff for the period of five years,

during the irrigating season of each year, and at a point to be designated by the plaintiff, on lots seven, eight, and nine, block twenty-five, Rancho San Bernardino, a continuous service of twenty-four hours of electric power, in an amount not less than ten nor greater than twenty horse-power, for the sum of \$6.50 per horse-power per month, it being agreed that plaintiff should have a reasonable time in which to purchase and place in working order necessary machinery to utilize the power for the pumping of water from its wells, situate on the lots before mentioned, before the contract should become operative for the first year. The defendant corporation commenced the performance of such agreement, but in December, 1900, destroyed the connections between its plant and plaintiff's pumping machinery, and thereafter refused to furnish any power whatever, and did not furnish power during the irrigating seasons of 1901 and 1902, but refused so to do.

The court found that the plaintiff was required to, and did, for the ten and one half months comprising the irrigating season of the two years mentioned, purchase of the only parties from whom such power was obtainable, and at the cheapest rate, power with which to operate its pumps, at a monthly cost of \$86 in excess of the cost to plaintiff under said contract with defendant; the aggregate of which excess was \$903, for which judgment was rendered.

Upon the trial the court below, under a general averment of damages, admitted evidence, against the objections of defendant, tending to show that seventy inches of water was necessary to irrigate the lands described in the complaint and upon which was situate the pumping plant. This proof of such use of water, its extent and necessity, was not essential in establishing plaintiff's rights under the contract, nor, perhaps, under the allegations of the complaint, admissible.

But it is apparent from the findings that nothing was considered and nothing entered into the judgment by way of special damages, and the error was not therefore prejudicial.

The court further admitted evidence tending to show that plaintiff, after the breach, in order to obtain the power agreed to be furnished to it by defendant, entered into an agreement in writing with another power company, from which it obtained the power for the delivery of which de-

defendant was in default; and the full execution thereof, and the payment for such power, was established. For the excess cost over that which would have resulted to plaintiff had defendant performed its contract, and for this excess cost, and nothing else, the court rendered judgment. Appellant insists that such evidence was inadmissible under the general *ad damnum* clause of the complaint. The contract set out in the complaint was in reference to the sale and delivery of personal property. The thing of which there may be ownership is called property under our code. (Civ. Code, sec. 654.) There may be ownership of all inanimate things which are capable of appropriation or of manual delivery. (Civ. Code, sec. 655.) Every kind of property that is not real is personal. (Civ. Code, sec. 663.) It may be regarded as a solecism to say that one may own a thing not susceptible of definition and the nature and character of which is practically unknown, yet when one gathers from the elements an energy or force which he may store, transmit, and utilize, he thereby appropriates to his own use that thing, whatever it may be, and it is a subject of ownership, of barter and sale, so long as it is in possession. The defendant by the contract agreed to sell the energy in which it had an ownership, and to deliver the same at stated times in fixed amounts; and, as appears from the contract, the price thereof had not been fully paid in advance. Section 3308 of the Civil Code provides: "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

"Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause. . . . The defendant must be presumed to be aware of the damages which necessarily result from the act done, and cannot be held to be taken by surprise." (*Treadwell v. Whittier*, 80 Cal. 579, [13 Am. St. Rep. 175, 22 Pac. 266].) "Special damages must be alleged solely for the purpose of giving defendant notice of plaintiff's claim." (*Bristol Mfg. Co. v. Gridley*, 28 Conn

201.) The parties to a contract of the character set out in the complaint must be held to have had in view the damages provided by law for its violation, and the minimum of damages must of necessity be the procurement from another of that which the defaulting party failed to deliver. To so act is by our supreme court, in *Mabb v. Stewart*, 147 Cal. 413, [81 Pac. 1073], held to be a duty as an observance of the principle that one injured must exercise reasonable care to render the injury as light as possible. In this case the injured party did not permit special damages to the groves and land for the irrigation of which the contract was obviously made, but did that which produced the least injury. It certainly cannot be said that one violating a contract cannot be supposed to contemplate as a result, and one which would necessarily follow its violation, that which would produce the least possible injury; notice is not essential when only such claim is sought to be established. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has been damaged to the extent of his actual loss, and his outlay fairly incurred. (*United States v. Beham*, 110 U. S. 338, [4 Sup. Ct. 81].)

The proposition advanced, that a party may disregard his obligations and confidently assume that the only consequence thereof is a nominal damage, and that such nominal damage is all that necessarily follows such violation and all that can reasonably be anticipated as a penalty, should have no support.

We find no error in the record, and the judgment is affirmed.

Smith, J., and Gray, P. J., concurred.

[No. 53. Third Appellate District.—August 31, 1905.]

SANTA ROSA BANK, Respondent, v. JOHN M. STRIENING et al., Defendants; H. B. SCHINDLER, Appellant.

APPEAL—DISMISSAL—FAILURE TO FILE BRIEF—SUBSEQUENT FILING.—A motion to dismiss an appeal for failure to file the appellant's brief within the time limited therefor must be determined by the facts existing when notice of the motion was given, and the right to a dismissal cannot be affected by the subsequent filing and service of the brief where no sufficient showing is given to excuse the delay.

MOTION to dismiss an appeal from a judgment of the Superior Court of Sonoma County. A. G. Burnett, Judge.

The facts are stated in the opinion of the court.

G. Gunzendorfer, and L. W. Juilliard, for Appellant.

James W. Oates, for Respondent.

CHIPMAN, P. J.—Motion to dismiss the appeal on the ground that appellant failed to file his brief in time. The transcript was filed May 16, 1904. Time in which to serve and file brief was extended by counsel for respondent to and including July 13, 1904. On July 13, 1904, counsel for appellant filed application in the supreme court asking twenty days' further extension of time to file brief, which was granted on that day. On August 2, 1904, that court granted twenty days' further time from and after that date, and on August 25, 1904, that court granted fifteen days' further time from that date, and in the order stated that "no further extension of time will be granted." Under these orders the time in which to serve and file points and authorities expired on September 9, 1904. The cause was transferred to this court on January 30, 1905, and was placed upon the present August calendar. On August 14, 1905, respondent served notice of motion to dismiss on appellant's attorneys, and filed said notice in this court on August 24, 1905, and on the latter day appellant filed in this court his points and authorities. Appellant had sent to the clerk's

office his points and authorities on August 18th, but not having previously served same on respondent's attorney, they were not filed until evidence of such service was furnished, which was on August 24, 1905.

Rule V of the supreme court (142 Cal. xliii, [64 Pac. viii]), which is made a rule of this court, provides that if the points and authorities of appellant be not filed within the time prescribed—which, by rule II (142 Cal. xli, [64 Pac. vii]), is thirty days after the transcript is filed—the appeal may be dismissed on motion, upon notice given. If, however, the points and authorities “be on file at the time such notice is given, that fact shall be sufficient answer to the motion.” In *McCabe v. Healey*, 139 Cal. 30, [72 Pac. 359], it was decided that a motion to dismiss must be determined by the facts existing at the time the notice of motion was given; and the right of the respondent to have the appeal dismissed under the rules cannot be affected or destroyed by any subsequent filing and service of the appellant's points and authorities.

Conceding, without deciding, that the court has discretion to refuse to dismiss the appeal, notwithstanding the rule above stated, upon a sufficient showing, we do not think such showing has been made. The motion is granted and the appeal is dismissed.

Buckles, J., and McLaughlin, J., concurred.

[No. 34. Second Appellate District.—August 31, 1905.]

RICHARD BRADLEY, as Administrator, etc., Respondent,
v. E. E. BUSH, Appellant.

ACTION AGAINST PAYEE OF NOTES AS INDORSER—PLEADING—GENERAL ISSUE—EVIDENCE—INDORSEMENT TO MAKER—TITLE THROUGH MAKER.—In an action by an administrator against the payee of notes as an indorser thereof, where the case was tried upon the theory that a general denial in the answer was sufficient to raise an issue, except as to the execution of the notes, it was error to exclude evidence to show that the notes were transferred by the indorsement to the maker, and were to be surrendered up thereto, and were to be transferred by the maker as evidences of debt secured by mort-

gage, in consideration of advances to be made to the maker by plaintiff's intestate.

ID.—EFFECT OF TRANSFERS—RIGHT OF ACTION AGAINST PAYEE NOT TRANSFERABLE BY MAKER.—The indorsement and surrender of the notes to the maker, with the understanding that they were to be transferred by the maker with the benefit of the mortgage security, was merely to keep the notes and security therefor alive for purposes of such transfer by the maker; but as the maker could not acquire any right of action upon the indorsement made thereto by the payee, no such right could be transferred by the maker, and the mere title to the notes was vested in the transferee of the maker.

APPEAL from an order of the Superior Court of Kings County denying a new trial. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

Hudson & Pryor, R. J. Hudson, and John F. Pryor, for Appellant.

H. Scott Jacobs, for Respondent.

SMITH, J.—Appeal from an order denying the defendant's motion for a new trial.

This is a suit by the administrator of an alleged indorsee against the defendant as maker and indorser of two promissory notes of the Sunset Vineyard Company, of date January 25, 1892, for the sum of one thousand dollars each. The notes became due on January 1, 1898, and on non-payment were duly protested and notice of dishonor given to the defendant.

The complaint alleges that the defendant, on or before February 1, 1894, for value received, duly indorsed, transferred, and delivered said promissory notes to the deceased, Bradley, the indorsee, and that at the time of his death he was the owner and holder of the notes. The answer "denies each and every material allegation" of the complaint; and as the case seems to have been tried upon the theory of the sufficiency of this denial, all of the allegations of the complaint are to be regarded as denied, with the exception of the execution of the promissory notes, which are set out at length. It is also affirmatively alleged that the note sued on was secured by a mortgage on real property; that there was no

consideration for the alleged indorsement and transfer; and, for separate defense, in effect, that the notes in question were two of thirty promissory notes made to defendant by the Sunset Vineyard Company as part of the purchase price of certain lands sold to it by the defendant, which at the time of the indorsement had been set to vineyard, and were being operated as such by the company, which owned no other land; that the company, of which Bradley was a large stockholder, was at that time heavily indebted and pressed by its creditors, and it thus became necessary for them to raise a large amount of money, which could be borrowed only from Bradley; and further (in terms), "that plaintiff's intestate, James A. Bradley, shortly prior to the indorsement of the notes sued on by defendant, complained to defendant (who was a stockholder and director of the company), that the Sunset Vineyard Company had paid a sum for its real estate greatly in excess of its value, and desired defendant to surrender some of the notes given to him as part of the purchase price for said land, and the said James A. Bradley wanted and was anxious to continue the raising of grapes and in pursuing the business of the corporation, as aforesaid; [that] it was then proposed by said James A. Bradley to defendant Bush that if he (Bush) would surrender the two notes in this action sued upon, said Bradley would advance to the corporation, Sunset Vineyard Company, the face value of said notes, with interest, which said proposition was accepted by defendant Bush, and thereupon said Bush indorsed said notes, and the moneys realized thereon were applied to the payment of the debts of the said corporation and the further carrying on of its business."

The court found that the allegations of the complaint were true; that the notes were secured by mortgage as alleged in the answer; that it was not true that there was no consideration for the defendant's indorsement; and (in the language of the answer) that the allegations of the defendant's special defense were true; and on these findings judgment was entered for the plaintiff.

The only witnesses who testified in the case were the plaintiff and defendant. The former testified that he received the notes after the death of his intestate from "Mr. Upton of the Central California Bank"; and he says as to one of the notes,

"I think it was amongst James A. Bradley's papers"; which was all he knew of the matter, except that he had received no payment upon the notes. From the defendant's testimony it appears that at the date of the transaction the notes were in the hands of Mr. Upton, as his bailee, already indorsed; and as to the terms of the transaction, that Bradley, who was the largest stockholder in the company, proposed to it: "If you will arrange with Bush to surrender those notes to you, I will let you have the money to go ahead and take care of your vineyard"; and also that he said to defendant: "If you will surrender those notes to the company, I will take the matter up and advance the company sufficient money." From other parts of the testimony it appears that the understanding was that Bradley was to take from the company the notes thus surrendered to it. Thereupon, the witness testifies: "I gave them [that is, the company] an order on Mr. Upton, who held the notes, to go and get them." Some little confusion is produced by answers of the witness to questions asked him on cross-examination; but on the whole it may be gathered that the transaction was as above stated; and on the close of his testimony, the defendant's attorneys proposed to put Mr. Upton on the stand, saying: "We expect to prove by him that Mr. Bush sent him word to give up those two notes to either Mr. Bradley, or some other representative of the Sunset Vineyard Company, and that Mr. Bradley came to Mr. Upton, who had the notes in his possession, and that Mr. Upton gave them to Mr. Bradley; [that] at the same time Mr. Upton asked Mr. Bradley whether he had been buying some notes, and Mr. Bradley said: 'No. I am a large stockholder in the Sunset and I have got to advance some money to them, and these notes are to be surrendered up.' " But the court excluded the evidence, saying: "There is the same evidence before the court now. I don't believe there can be any dispute as to the facts of the case at all." To which ruling the defendant excepted.

From this it appears that the court understood the transaction as stated above; but it will be observed that the declarations of Bradley to Upton had not been proved, and that the testimony offered as to these was not only new, but of material importance. For, the transaction being as stated, it would follow that Bush did ~~not~~ indorse, transfer, or deliver

the note to Bradley, but to the company; as to which the transfer and indorsement could create no obligation (Civ. Code, sec. 3116); nor, indeed, could it have any effect other than that of a mere relinquishment or surrender of his title to the company. The ordinary effect of such a transaction would be to extinguish the obligation itself; but here, by agreement between Bradley and the corporation, assented to by Bush—who held the other notes—the note was not to be canceled, but was to be transferred by the latter to Bradley, to be held by him as evidence of its debt, with the benefit of the mortgage security. Such an agreement would doubtless be valid, and its effect would be to keep the note alive and to vest the title in Bradley. But—assuming the facts to be as stated in the offer of proof—his title would come to him from the company, and there would be no contract of transfer or indorsement between him and Bush; nor, indeed, any direct contractual relation whatever. Nor could Bradley acquire from the company any right of action against Bush; since the company itself by the transfer or surrender to it of its own obligation did not acquire such right of action.

That such was the contract might, indeed, have been inferred from the uncontradicted testimony of Bush, without the aid of the testimony offered; or, indeed, it might be inferred from the specific facts found by the court, if they stood by themselves. But, as appears by the findings as to the transfer, indorsement, and delivery of the note, and as to consideration, the court took a different view, and it is clear that had the rejected evidence been admitted, these findings could not be sustained. For these reasons, the order appealed from must be reversed.

The order appealed from is reversed and the cause remanded for new trial.

Allen, J., concurred.

GRAY, P. J.—I concur for the sole reason that I think the court erred in excluding the offered testimony of Upton.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on October 30, 1905.

[Crim. No. 12. First Appellate District.—August 31, 1905.]

THE PEOPLE, Respondent, v. WILLIAM PROCTOR, Appellant.

CRIMINAL LAW—LARCENY—FALSE PRETENSES.—In order to constitute the crime of larceny, the owner of the money stolen must not have intended to part with the property or the money stolen; and where the evidence shows that the prosecuting witness loaned the money to the defendant, thus parting with the title and possession of it, which was secured by reason of false and fraudulent representations knowingly and designedly made, no conviction can be sustained for larceny, the crime being that of obtaining money by false pretenses.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. Henry A. Melvin, Judge.

The facts are stated in the opinion of the court.

Aldrich & Gentry, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

COOPER, J.—Defendant is charged in the information with the crime of grand larceny committed on the nineteenth day of December, 1904, by feloniously stealing, taking, and carrying away one hundred and eight dollars in gold and silver coins, the property of Emeline Tyson. He was found guilty as charged, and sentenced to a term of six years in San Quentin. His motion for a new trial was denied, and he prosecutes this appeal from the judgment and order denying his motion.

The facts relied on to sustain the verdict are stated by the prosecuting witness, Emeline Tyson, and are in substance as follows: Emeline Tyson was past seventy-six years of age on Friday, December 16, 1904, when she first met defendant at Niles station and had a moment's conversation with him. He came to her house, which was about one mile from the station, the following morning, and sold her a pair of spectacles. While there they engaged in a general conversation. He told her that he had been a widower for about fifteen years, had traveled around a great deal, but was tired of liv-

ing that way, that she was just the woman he had been looking for, that it was a case of "love at first sight." His love-making seems to have been agreeable, as he promised to call again that (Saturday) evening. He did not, however, call on Saturday evening, but did call Sunday morning, and made an excuse for not having called Saturday evening. He called again Sunday evening, and the prosecuting witness gives an account of the transaction in the following language: "He asked me to marry him, and I told him I would if I found him to be a perfect gentleman and able to take care of me. He said he was plenty able to do it, that he had an old house and lot in Oakland that he was trading off for a new house. He said he had five hundred and fifty dollars in the bank, and needed sixty dollars more to make the deal or he would lose the bargain. He said he wanted the new house for us to live in. Then I agreed to let him have the money. He said he would give me good security for it, that he had a bill of sale of an auto worth five hundred dollars, and that he would give me a bill of sale as security. I promised then to try and get the sixty dollars for him the next morning. I saw him the next morning (Monday) at my home. He said he had just received a letter from his sister in the East and that they had sold out and she was coming on and that he would soon have a lot of money. He said he was giving me good security and would have the money on the 15th of January. He said 'You just as well make it out now one hundred and eight; I want a little Christmas money, too, and I am giving you good security for it and will pay it back on the 15th.' His sister was coming and would have a lot of money. Then I got the money and let him have it, one hundred and eight dollars lawful money of the United States. Then he gave me the bill of sale to an automobile. When he paid this money back on the 15th of January I was to give him back the bill of sale."

The witness further testified in cross-examination: "There was no agreement on his part to use any of this money for me. I was simply lending him so much money and he was going to give me this false bill of sale. I would not have let him have this money on this bill of sale if he had not have been going to marry me. The only reason I had for handing this money to this defendant upon that 19th day of Decem-

ber, 1904, were that we were engaged to be married, that he said he would give me good security, this bill of sale of a fine automobile, and that he would be plenty able to pay it back on the 15th of January."

The only question that need be discussed is as to whether or not the verdict of larceny is supported by the facts as stated. Larceny is the felonious stealing or taking away the personal property of another. The title to the property is not changed, but remains in the party from whom the property was taken.

Where the owner parts with the possession and title by reason of false and fraudulent representations, knowingly and designedly made, the crime is not larceny, but that of obtaining money by false pretenses.

The distinction that runs through the books, as stated by the judges and text-writers, is, that to constitute larceny the owner of the property stolen must not have intended to part with the title to it, while in false pretenses he did intend to part with the property and the title thereto, but the intention was brought about by fraudulent circumstances. If the transaction has not been completed, and the owner did not intend to part with the title to the property, and the defendant procured the possession by means of false and fraudulent representations, the crime is larceny. The court below correctly stated the law to the jury in its instruction wherein it said: "If you find from the evidence that the money which is the subject of the alleged larceny in this action was obtained by the defendant from the prosecuting witness, Emeline Tyson; and that the said Emeline Tyson voluntarily gave the money to the defendant; and that she, Emeline Tyson, did not expect to get any part of this money back from the defendant; and that said Emeline Tyson intended to part with the ownership as well as the possession of said money; and that at the time the money was so obtained it was understood by the said Emeline Tyson that said money was to be used by the defendant on his own account, then the defendant is not guilty of larceny, even though you should find that the defendant fraudulently obtained the money by means of false pretenses. You must judge of the intent which governed the acts of the complaining witness, Emeline Tyson, in handing over the money by the knowledge possessed by her at the time she

handed over the money, and not by any facts which she may have learned afterwards."

The prosecuting witness loaned the money to defendant. She parted with the possession and title to it. She believed at the time that defendant was to be her future husband. She believed him to be a perfect gentleman, and that the automobile was good security. She was the victim of misplaced confidence and affection, but defendant did not commit larceny in getting her money.

The judgment and order are reversed.

Hall, J., and Harrison, P. J., concurred.

[No. 23. First Appellate District.—August 31, 1905.]

In the Matter of the Estate of ALBERT JEFFREYS,
Deceased. WILLIAM M. ABBOTT, Appellant, v.
FRANK H. KERRIGAN et al., Respondents.

WILL—BEQUEST OF BOOKS AND PAPERS—BANK-BOOKS EXCLUDED.—

Where a testator leaves among his effects a large number of law and other ordinary books, a bequest of "all my books and papers" will not be construed to include bank-books or the moneys on deposit represented thereby, especially where such an interpretation would render of no effect other provisions of the will.

APPEAL from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

L. A. Gibbons, for Appellant.

J. J. Lermen, and Charles W. Slack, for Respondents.

HALL, J.—This is an appeal by William M. Abbott from a decree of distribution, and the only question involved is as to the proper construction of the will of Albert Jeffreys, deceased.

The will is holographic and is as follows:—

“My will. April 10th, 1902. I owe William M. Abbott \$600 which I wish paid.

“To the Rev. M. D. Connolly I give the sum of \$1,000.

“To William M. Abbott I give all my books and papers.

“To Eugenie M. St. Paul I give the rest and residue of my estate of every kind and nature.

[Then follows a statement naming two persons to whom he leaves nothing, a provision as to persons who may claim to be heirs, the appointment of executors, a revocation of former wills, waiver of bonds, and a provision for sale of real estate without order of court.]

“ALBERT JEFFREYS.”

The appellant contends that under the clause “To William M. Abbott I give all my books and papers” there passed to him fourteen certain bank-books, and in consequence the moneys on deposit represented by such books. The court below ordered distribution of a large number of books, consisting mostly of law-books, a promissory note, and a certificate for one hundred and forty-three shares of stock to appellant; one thousand dollars to Rev. Connolly; and the residue of the estate, consisting of an interest in four parcels of land, one typewriter, and \$1,661.97, to Eugenie M. Roberts, described in the will as Eugenie M. St. Paul, but since married to Roberts.

The money—to wit, the \$2,661.97—thus distributed was what was left of the deposits represented by the bank-books. At the death of the testator the fourteen bank-books represented deposits in various banks to the credit of testator, aggregating upwards of eighty-seven hundred dollars. If the contention of appellant be correct this entire sum of money passed to him, and should not have been charged with the payment either of expenses of administration, debts, or the legacy to Connolly, until the property given to the residuary legatee had been exhausted. (Civ. Code, secs. 1359, 1360.)

It must be confessed that a bank-book is a book, and yet the average mind, we think, would not ordinarily understand that by a bequest of “all my books” a testator meant to bequeath money in bank. Appellant himself does not seem to have realized the full possibilities of his case until late in the

proceedings of this estate, for he seems to have remained silent while the executor appropriated upwards of six thousand dollars out of the bank deposits to the payment of expenses of administration and debts. There was left for distribution but \$2,661 out of the \$8,700 on deposit at the death of the testator; and as we have shown, if appellant's contention be correct, recourse should have first been had to the real estate and typewriter, which passed under the residuary clause, for the payment of all expenses and debts.

While bequests of books are quite common, and many persons leave bank-books among their effects, we have been cited to no case, and we know of none, where a court has held that under a bequest of "books," or "all my books," bank-books, and in consequence bank deposits, passed.

We are cited to *Perkins v. Mathes*, 49 N. H. 107, as sustaining appellant's contention. In that case it was held that under "all my books and papers of every description" a promissory note passed. Unless this construction had been adopted nothing would have passed to the particular legatee save a Bible, some ordinary books, and a manuscript, all of very little pecuniary value.

In the companion case (*Mathes v. Smart*, 51 N. H. 438), construing the same words in the same will, it was held that two bank-books showing deposits in the Newmarket Bank did not pass, and the court said: "In *Perkins v. Mathes* we were influenced not a little by the consideration that, unless the promissory notes were to be regarded as comprehended in the bequest of books and papers, there was in reality no bequest of practical value to the plaintiff." Indeed, in *Perkins v. Mathes* the court said, "A testator is to be considered as intending a benefit to the object of his gift."

In *Webster v. Wiers*, 51 Conn. 569, it was held that the words "I give to M. all my household effects, books and papers of value, and everything the house contains" did not pass a bank-book showing a deposit of twenty-five hundred dollars, although found in the house.

In *Jackson v. Piscataqua Savings Bank*, 70 N. H. 283, [47 Atl. 613], it was held a bank-book showing deposits in the name of Nathaniel Jackson, Jr., where testator had retained the book in his possession till death, and did not by making the deposit intend a gift, did not pass by a bequest of "cer-

tain books marked with his name," there being found three ordinary books marked "Nathaniel Jackson."

"Words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." (Civ. Code, sec. 1324.) Applying this rule to the words in question, would the ordinary man understand by the words "my books" used in ordinary conversation that the speaker meant bank-books? If a man should say in ordinary conversation, "I am the possessor of one hundred books," would any listener suppose for a moment that he meant to include in such statement "bank-books"? We think that the answer to both these questions is obviously no, notwithstanding the definition of the word "book" given in dictionaries is broad enough to include bank-book. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative" (Civ. Code, sec. 1325); "and a testator is to be considered as intending a benefit to the object of his gift." (*Perkins v. Mathes*, 49 N. H. 107; *Wallace v. Wallace*, 23 N. H. 149.)

If the construction of this will asked by appellant be adopted, the residuary legatee would receive nothing and the residuary clause would have no effect, for the entire residue, including the \$1,661 in money distributed to said legatee, amounted in value to but \$2,160. (The inheritance tax charged to said legatee was \$108, which is the tax on a valuation of \$2,160.) The real estate and typewriter which, according to the theory of appellant, constitute the residue of the estate, therefore, were worth but seven hundred dollars. This would not be sufficient to pay the Connolly legacy of one thousand dollars, not to mention the six-hundred dollar debt owing by testator to appellant and by the will directed to be paid, and the other debts and expenses of administration, all of which, under the law, are first chargeable against the property given to the residuary legatee before resort could be had to any property given to appellant. (Civ. Code, secs. 1359, 1360.) Neither Connolly nor Mrs. Roberts could have properly received anything from this estate if the contention of appellant be correct, for, exclusive of the \$8,700 represented by the bank-books, the entire estate seems to have

consisted only of the typewriter and real estate, valued at seven hundred dollars, about six hundred dollars received from the employers of testator, and some rentals from the real estate, while the debts and expenses of administration seem to have exceeded six thousand dollars. It is true that the debts and expenses seem to have been paid by the executor out of the moneys in bank; but if the contention of appellant be correct these moneys should not have been resorted to until the property given to the residuary legatee had been exhausted. (Civ. Code, secs. 1359, 1360.) Thus it is seen that if the lower court had adopted the construction asked by appellant, and such construction had been fully carried out in the settlement of this estate, both the bequest to Connolly and to Mrs. Roberts would have been rendered nugatory, and the rule laid down in section 1325 of the Civil Code, as well as the rule followed in *Perkins v. Mathes*, 49 N. H. 107, violated. Where a testator leaves among his effects a large number of law-books and other ordinary books we do not think that a court ought to assume that by a bequest of "all my books and papers" a testator meant to give several thousand dollars on deposit in banks, although such deposits are evidenced by bank-books, especially where, as in this case, such an interpretation would render of no effect other provisions of the will.

The decree of distribution is affirmed.

Cooper, J., and Harrison, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on September 23, 1905.

[No. 76. First Appellate District.—September 1, 1905.]

In the Matter of the Estate and Guardianship of ELEANOR LOUISA DELLOW and VINCENT ALEXANDER DELLOW, Minors.

GUARDIANSHIP OF MINORS—WELFARE OF CHILDREN—QUESTION OF FACT—SUPPORT OF FINDINGS.—In awarding the guardianship of orphan minors, the court is to be governed by what appears to be for the best interests of the children in respect to their mental and moral welfare. The question as to such welfare is one of fact, and where a finding of the court that it is for the best interests of the minors that the godmother of one of the children should have the control of them rather than their aunt, is sustained by the evidence, and the godmother was appointed as such guardian, the appointment will not be disturbed upon appeal from an order denying a new trial, regardless of whether a finding that the father requested such godmother to act as their guardian is or is not supported by the evidence.

ID.—APPEAL FROM JUDGMENT AFTER SIXTY DAYS—REVIEW OF EVIDENCE.—Upon appeal from the judgment, taken more than sixty days after its entry, the insufficiency of the evidence to support it cannot be reviewed, and the judgment must be affirmed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Nathan H. Frank, for Appellant.

John M. Burnett, for Respondent.

HALL, J.—There are two appeals in this case,—one by Flora Dellow from a judgment of the trial court denying her petition to be appointed guardian of the persons and estates of Eleanor Louisa Dellow and Vincent Alexander Dellow, minors, and granting the petition of Rose A. Shields to be appointed guardian of the same children, and another from an order denying appellant's motion for a new trial,—both before us on one record.

The appeal from the judgment was taken more than sixty days after the rendition of judgment, and therefore the suffi-

ciency of the evidence to sustain it cannot be considered on the appeal from the judgment. This is conceded to be true by counsel for appellant in his brief, and it is not contended that the findings do not support the judgment; so the judgment must be affirmed.

As to the appeal from the order denying the motion for a new trial, it is urged by the respondent that the record does not show what motion was in fact made, nor upon what grounds the motion was predicated; that though a notice of intention to move for a new trial was filed, and a bill of exceptions settled containing such notice and specifications as to insufficiency of the evidence to support certain findings, the only record as to what motion was in fact made is contained in the clerk's entry in these words:—

“(Title of Court and Cause.) October 7, 1904. Motion for new trial ordered denied.

“W. J. KENNEDY, D. C. C.”

However, as we think the action of the lower court must be sustained on the merits, we do not think it necessary to pass on the technical point thus raised.

At the time of the application for guardianship the boy Vincent was aged three years, and the girl Eleanor was aged eight years. The mother of the children died when the boy was four months old, and the father died October 7, 1903, five days before the filing of the petition by appellant. The estate of the children consists of an insurance on the life of their father in the sum of three thousand dollars, payable in equal shares to the children. Appellant, Flora Dellow, is an aunt of the children and their only relative in this state, while respondent is in no way related to the children, but had had the care and custody of the girl for some time before the death of the father, and immediately upon his death took the custody of the boy from another stranger, and had the custody of both at the time of filing the petition.

The court heard the two petitions together, and made findings of fact, and denied the petition of appellant and granted that of respondent. Appellant moved for a new trial, and we are now considering her appeal from the order denying such motion. The bill of exceptions contains a stipulation that it contains all the testimony admitted in the case.

Among other things, the court found "That it is for the best interests of said minors that said Rose A. Shields should be appointed guardian of their persons and estates."

The parents both being dead, this, under our statute, was the paramount issue to be determined by the trial court. Section 246 of the Civil Code provides: "In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations: 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare." If the finding above quoted is supported by the evidence, it is of no consequence whether the finding also made by the court, "That said J. A. Dellow (father of the children) requested that said Rose A. Shields should have the care and custody of said minors, and should act as their guardian," is supported by the evidence or not.

In the matter of the *Guardianship of Lewis*, 137 Cal. 682, [70 Pac. 926], the court said: "The question as to which one of these two parties was the proper party to be appointed guardian over the person of this child was essentially a question of fact for the trial court, and that court having decided it, and there being substantial evidence to support that decision, this court will not interfere by setting aside the order for lack of evidence." In the case just referred to the prevailing party was the *grandmother* and the appellant was the *father*.

The evidence in the case now before us shows both petitioners to be worthy people. Appellant was obliged to work to support herself. She believed that her brothers and sisters in England would assist her to support the children. She came here from England at the request of her brother, the father of the children, and cared for them until, because of his drinking habit, she left his home.

Respondent is the godmother of one of the children; and upon appellant leaving the home of the father of the children, she, at his request, took the girl, and promised to take the boy when he became older. She is a dressmaker, and also takes lodgers, and has resided in the same block for eleven years. She testified that she was financially able to take care of the children, and that she could and would maintain them without using any of the money which may come to them from the insurance on the life of their father.

She is of the same religious faith as was the mother of the children, is the godmother of one, as before stated, and her sister of the other child.

Both petitioners were before the judge of the trial court, and their manner and appearance were open to his observation.

Under these conditions we cannot say that the finding under consideration is not sustained by the evidence. And as it is the controlling factor in the case the order appealed from as well as the judgment must be affirmed.

It is so ordered.

Cooper, J., and Harrison, P. J., concurred.

[No. 39. First Appellate District.—September 6, 1905.]

L. M. SHERWOOD et al., Respondents, v. FRANK A. WALLIN, Appellant.

SPECIFIC PERFORMANCE—CONTRACT FOR TRANSFER OF STOCK, BOOKS AND PAPERS—CONTROL OF MINING CORPORATION—PLEADING—INADEQUATE REMEDY AT LAW.—In an action for the specific performance of a contract alleged to have been fully performed on plaintiff's part, to transfer a certain number of shares of stock, and to turn over the books, papers, seals and certificates of a mining corporation, so as to insure to plaintiff the majority of the stock and the control of the corporation, averments in the complaint that the stock, books, papers, etc., have no specific or certain market value, but would be of great value to plaintiff, and that the retention thereof by the defendant and his refusal to perform the contract will work irreparable injury to plaintiff, and that it will be difficult to do justice to plaintiff by an award of pecuniary damages, are sufficient to show that plaintiff has no adequate remedy at law, and a demurrer to the complaint was properly overruled.

ID.—PARTIES—CORPORATION.—The mining corporation is not a necessary party to such action for specific performance.

ID.—SURRENDER OF NUMBERED CERTIFICATE—ISSUANCE OF NEW SHARES TO DEFENDANT—IDENTITY NOT AFFECTED.—Where it was agreed that a certain numbered certificate held by the defendant should be surrendered, and the agreed shares, issued to plaintiff and the remainder to defendant, and upon surrender thereof the whole number

of shares were issued to the defendant, which he retained, and, upon perfecting his appeal, deposited with the clerk, the change in the number of the certificate does not affect the identity of the stock affected by the agreement.

1D.—FORM OF FINDING.—A finding that defendant has not surrendered the agreed numbered certificate to the secretary of the company, so that a specified number of shares should be issued to the defendant, and the remainder to the plaintiff, is not untrue as to the substantive matter found.

1D.—IMMATERIAL ERROR IN FORM OF JUDGMENT.—There was no substantial error in the form of the judgment in requiring the original numbered certificate to be surrendered for cancellation, and that the plaintiff receive the specified number of shares thereof, and that the defendant take the remainder. The real thing ordered is the transfer of the specified number of shares to plaintiff, and such transfer would be a sufficient compliance with the judgment to entitle defendant to a satisfaction thereof.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Edwin L. Forster. for Appellant.

The complaint is insufficient in not setting forth facts showing that plaintiff has no adequate remedy at law. (*Senter v. Davis*, 38 Cal. 453; *Branch Turnpike Co. v. Yuba County*, 13 Cal. 190; *Barrett v. Whitesides*, 13 Cal. 156; *Wolfe v. Titus*, 124 Cal. 264, 56 Pac. 1042; *Powell v. Central Plank Road Co.*, 24 Ala. 441; *McClane v. White*, 5 Minn. 178; *Botsford v. Beers*, 11 Conn. 369; *Prewitt v. Jenkins*, 1 Blackf. 294; *Noyes v. Marsh*, 123 Mass. 286.) The plaintiff not being possessed of the certificate alleged, found, and specified in the judgment, the court erred in enforcing the contract respecting the same. (*Cud v. Butter*, 5 Vin. Abr. 538, 1 P. Wms. 571.)

Purcell Rowe, for Respondents.

The complaint states a cause of action, and shows the inadequacy of the remedy at law. (*Treasurer v. Commercial Mining Co.*, 23 Cal. 391; *Frus v. Houghton*, 6 Colo. 322; *Byers v. Denver etc. Co.*, 13 Colo. 556, 22 Pac. 951; *Goodwin*

Gas Stove etc. Co. v. Appel, 117 Pa. St. 535, 2 Am. St. Rep. 700, 12 Atl. 736; *Manton v. Ray*, 18 B. I. 674, 49 Am. St. Rep. 812, 29 Atl. 998; *Magibben v. Perin*, 49 Fed. 187.) The certificate is but evidence. The substance is the stock. The cancellation of certificate No. 7 and the issuance of a new certificate worked no change in the stock itself. (*Hawley v. Brumagim*, 33 Cal. 394; *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084; *Hayward v. Rogers*, 62 Cal. 348; *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 45 Pac. 10.) The corporation was not a proper party. It is not interested in the transfer of its stock. (*Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120; *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332; *Williamson v. Krohn*, 66 Fed. 655.)

HALL, J.—Action for the specific performance of a contract in which plaintiffs secured a judgment, and defendant appeals from the judgment on the judgment-roll and a bill of exceptions.

Appellant demurred to the complaint, and now urges that "The demurrer should have been sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant, in that it does not state facts showing that the plaintiffs have not a plain, speedy, and adequate remedy at law."

In support of this contention appellant cites us many authorities to the effect that specific performance will not be decreed except where plaintiff has no plain, speedy, and adequate remedy at law. (*Senter v. Davis*, 38 Cal. 450; *White v. Fratt*, 13 Cal. 521; *Duff v. Fisher*, 15 Cal. 375; *Imlay v. Carpenter*, 14 Cal. 173; *Moulton v. Knapp*, 85 Cal. 385, [24 Pac. 803].)

Conceding the general rule to be as claimed by appellant, we think that plaintiffs, by the allegations of their complaint, brought themselves within the rule.

The complaint is quite long, but in order to understand the question involved we will endeavor to state the salient facts alleged. By way of inducement it is alleged that plaintiffs and one George W. Mann had entered into a contract for the formation and promotion of the Golden Key Mining Company; that it had been agreed that a certificate for 17,500 shares of the stock should be issued to said George W. Mann,

but left in escrow with one of the plaintiffs, L. M. Sherwood, until said Mann should fully perform the things agreed by him to be performed; that said stock (certificate No. 7) was issued and placed in the hands of said Sherwood; that thereafter Mann brought a suit in claim and delivery in the United States circuit court for said stock, and in such suit the United States marshal took possession of said certificate of stock and held the same until given up as thereafter alleged. It was also alleged that Mann further claimed an interest in five thousand other shares of the stock of said company, which he was to hold and vote at all meetings of the stockholders; that he claimed that the company was indebted to him in a large sum, the amount being unknown to plaintiffs; that said Mann had in his possession the books, papers, records, and seal of said company, and refused to surrender them to the secretary of said company until his demands on plaintiff were satisfied; that plaintiffs denied and contested the claims made by Mann, and asserted that Mann had failed to comply with the terms of the contract between plaintiffs and Mann; that plaintiffs were the owners of said certificate No. 7 after the rights of said Mann were extinguished, and equally interested in the other certificate of stock, etc.

Then follow allegations to the effect that defendant, Wallin, with full knowledge of the matters above recited, agreed with plaintiffs in consideration of 5,000 shares of said 17,500 to be given him, and the consent of plaintiffs to a dismissal of the suit concerning said 17,500 shares, and the consent of plaintiff L. M. Sherwood that the United States marshal deliver said stock to defendant, to effect a settlement with Mann of all things in dispute between plaintiffs and Mann, to secure the dismissal of said suit in the United States court, the surrender to defendant of said stock, the indorsement thereof to defendant by Mann, the execution of an assignment by Mann of all his interest, etc., in and to said company, either as promoter or otherwise, and of all his rights under said contracts with plaintiffs, the delivery by Mann to Wallin of all books, papers, seal, and certificates of said company in hands of Mann.

That immediately upon the completion of the settlement with Mann defendant would immediately surrender said certificate No. 7 for 17,500 shares of said stock to the secretary

of said company for cancellation, and there should be then issued 12,500 shares thereof to plaintiffs and 5,000 shares to defendant in full payment for his services and payments in the settlement with Mann.

That said defendant further agreed that he would turn over to plaintiffs all the said books and papers and documents received from Mann, and would make, execute, and deliver an assignment of all rights, etc., assigned by Mann to him.

Then follow allegations showing the complete settlement with Mann, effected by defendant, a demand by plaintiffs on defendant that he surrender the certificate for 17,500 shares for cancellation, and that he have issued 12,500 thereof to plaintiffs and 5,000 to himself, and that he turn over to plaintiffs the books, papers, and documents received from Mann, and that he execute and deliver to plaintiffs an assignment of all the rights, etc., assigned by Mann to him as in the complaint specified, and the refusal of defendant in all respects to comply with the demand of plaintiffs.

That plaintiffs have fully performed the contract with defendant.

Then follow allegations to the effect that plaintiffs now own 45,000 shares, and with the 12,500 shares agreed to be turned over to plaintiffs they would have a majority of the capital stock of the company; while if defendant be allowed to retain the 17,500 shares of stock he would be able to control a majority of the stock, and will so conduct the affairs of said company as to destroy the value of the stock owned and held by plaintiffs.

"That the stock of said company is of *uncertain value in the market at this time*, but, as plaintiffs are informed and believe, will be of great value if they are enabled to retain their majority of the stock of said company, and the said defendant is not permitted to secure the control of said company.

"That the retention of the control of said stock and the refusal of said defendant to fulfill his said contract will work the said plaintiffs irreparable injury, and that the damage to plaintiff cannot be readily estimated in an award of damages.

"That the agreements, contracts, papers, books and assignments as above specified to be made and turned over to plain-

tiffs by defendant under said contract are of great importance to plaintiffs, but have no *specific* or *certain market value*, and it will be *difficult to do justice by an award of pecuniary damages.*"

The allegations above set forth are sufficient, we think, to show that plaintiffs had no adequate remedy at law. (*Treasurer v. Commercial Mining Co.*, 23 Cal. 390; *Senter v. Davis*, 38 Cal. 453; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, [32 Am. Rep. 315]; *Krouse v. Woodward*, 110 Cal. 638, [42 Pac. 1084]; *Mantou v. Ray*, 18 R. I. 672, [49 Am. St. Rep. 811, 29 Atl. 998]. Also, though not so directly in point, *Fleishman v. Woods*, 135 Cal. 256, [67 Pac. 276].)

Neither was it necessary to join the corporation in the action. (*Sayward v. Houghton*, 82 Cal. 628, [23 Pac. 120].)

No error was committed in overruling the demurrer to the complaint.

What we have already said disposes of the point urged that the court erred in finding that the plaintiffs had not a plain, speedy, and adequate remedy at law, as there was sufficient evidence to support the specific allegations above set forth.

It is next urged that the court erred in finding "that defendant had not surrendered certificate No. 7 for cancellation."

In answer to this it is sufficient to say that the finding is: "That he has not surrendered certificate No. 7 for 17,500 shares of the capital stock of the Golden Key Mining Company to the secretary thereof, so that 5,000 shares may be issued to him, and the remainder, 12,500 shares to the plaintiffs." The substantive thing to be done was the turning over of 12,500 shares to the plaintiffs, and there is no pretense either in the answer of defendant or in his evidence that he has done so. On the contrary, his answer was to the effect that he was entitled to retain the 17,500 shares, and his evidence was that he had done so. As appears from a stipulation in the record, defendant, for the purpose of perfecting this appeal under section 943 of the Code of Civil Procedure, has deposited with the clerk of the trial court certificate No. 128, representing 17,500 shares of said stock. The finding in the terms made by the court is strictly true. His evidence shows that he still has the same 17,500 shares, though repre-

sented by another certificate. The change of certificates did not affect the identity of the stock, which was the real thing in controversy. (*Hawley v. Brumagin*, 33 Cal. 394; *Krouse v. Woodward*, 110 Cal. 638, [42 Pac. 1084]; *Craig v. Hesperia Land etc. Co.*, 113 Cal. 7, [54 Am. St. Rep. 316, 45 Pac. 10].)

For the same reasons the court did not err in giving judgment for the surrender of "certificate No. 7 for 17,500 shares of the capital stock of said company, for cancellation, and that the plaintiffs receive 12,500 shares of the same and the defendant take the remainder. 5,000." Looking through the matter of form and to the substance, the real thing thus ordered was the transfer from defendant to plaintiffs of 12,500 shares of said stock; and such a transfer would have been a sufficient compliance with the judgment to entitle defendant to a satisfaction thereof. This court must disregard errors in mere form that do not affect substantial rights of the parties. (Code Civ. Proc., sec. 475.)

The judgment is affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 43. First Appellate District.—September 6, 1905.]

R. N. NASON, Respondent, v. WILLIAM JOHN, Appellant,
and G. A. WILLIAMS, Co-Defendant.

MECHANICS' LIENS—FORECLOSURE AGAINST OWNER—CONTRACTOR NOT SUMMONED—APPEAL—SERVICE OF NOTICE.—Upon appeal by the owner from a judgment foreclosing mechanics' liens against him, the contractor, who was a mere nominal party defendant, and was not served with summons and did not appear, and against whom no judgment was rendered, need not be served with the notice of appeal.

ID.—INSUFFICIENT COMPLAINT AGAINST OWNER.—A complaint by a materialman against the owner which does not allege that at the time of filing the notice of lien or bringing the action, anything was owing from the owner to the contractor, nor allege any premature payment by the owner to the contractor, nor any other facts giving the materialman a lien against the property of the owner, is insufficient to state a cause of action.

ID.—AMOUNT OF CONTRACT NOT ALLEGED—PRESUMPTION.—Where it is not alleged that the contract was for a sum in excess of one thousand dollars, it must be presumed that the contract was not such a one as is required to be in writing and recorded, but was one in which the whole contract price may have properly been payable in advance, or in ~~such~~ installments as the owner and the contractor may have agreed upon.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Otto tum Suden, for Appellant.

The complaint is insufficient. It does not show that the contract exceeds one thousand dollars, nor state any sum left unpaid in the owner's hands, nor any facts entitling him to a lien. The evidence shows that the contract price was less than one thousand dollars, in which case the owner was not required to retain any part of the contract price. (*Sidlinger v. Kerkow*, 82 Cal. 44, 22 Pac. 932; *Dennison v. Burrell*, 119 Cal. 180, 51 Pac. 1; *Santa Monica L. and M. Co. v. Heges*, 119 Cal. 376, 51 Pac. 555; *Southern California L. Co. v. Jones*, 133 Cal. 242, 65 Pac. 378.) The complaint does not allege that any part of the contract price was left in the owner's hands, and he could retain only such part as may have been so left. (*Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Kerckhoff etc. Co. v. Cummings*, 86 Cal. 26, 24 Pac. 814; *Gibson v. Wheeler*, 110 Cal. 243, 42 Pac. 810; *Dennison v. Burrell*, 119 Cal. 180, 51 Pac. 1; *Dore v. Sellers*, 27 Cal. 588; *Blythe v. Poultney*, 31 Cal. 233; *Wells v. Cahn*, 51 Cal. 423; *Renton v. Conly*, 49 Cal. 185; *Dingley v. Greene*, 54 Cal. 333; *Rosenkranz v. Wagner*, 62 Cal. 151; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846; *O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204; *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389; *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Harmon v. San Francisco etc. R. R. Co.*, 86 Cal. 617, 25 Pac. 124; *Southern California L. Co. v. Jones*, 133 Cal. 242, 65 Pac. 378.)

C. L. Dam, for Respondent.

All ambiguities must be resolved in favor of the complaint, and the complaint is sufficient. (*Santa Barbara v. Eldred*,

108 Cal. 294, 41 Pac. 410.) The appeal should be dismissed for want of service of the notice upon the contractor. (*Lancaster v. Maxwell*, 103 Cal. 67, 68, 36 Pac. 951.)

HALL, J.—Defendant William John appeals from a judgment foreclosing a materialman's lien for \$129.39 against him as owner.

Respondent in his brief moves that the appeal be dismissed, because no notice of appeal was served on Williams, the contractor and co-defendant with appellant. The decree, however, recites that "defendant G. A. Williams, not having been served with process, was not before the court." No judgment was taken against Williams.

Defendants not served with process and not appearing, and against whom no judgment is taken, need not be served with notice of appeal. (*Terry v. Superior Court*, 110 Cal. 87, [42 Pac. 464]; *Hinkel v. Donohue*, 88 Cal. 597, [26 Pac. 374]; *Merced Bank v. Rosenthal*, 99 Cal. 39, [31 Pac. 849, 33 Pac. 732]; *Clarke v. Mohr*, 125 Cal. 540, [58 Pac. 176].)

The motion to dismiss the appeal is denied.

Appellant contends that the judgment must be reversed for the reason that the complaint states no cause of action as against appellant. This contention must be sustained. The action is by a materialman against the owner (appellant) for the value of material (paints, etc.) furnished the contractor for the painting of the house of appellant.

There is in the complaint no attempt to allege that at the time of filing the notice of lien or of bringing the action there was anything owing from the owner (appellant) to the contractor, nor is any attempt made in the complaint to allege any fact, such as a premature payment by the owner to the contractor, or the like, that under section 1184 of the Code of Civil Procedure might be claimed to give the materialman a lien against the property of the owner for the value of his materials.

That such an allegation is necessary to state a cause of action in this class of cases is well settled by the following authorities: *Turner v. Strenzel*, 70 Cal. 28, [11 Pac. 389]; *Whittier v. Hollister*, 64 Cal. 283, [30 Pac. 846]; *Rosenkrans v. Wagner*, 62 Cal. 151; *Wells v. Cahn*, 51 Cal. 423; *Renton v. Conly*, 49 Cal. 185. See, also, *Harmon v. San Francisco*

etc. B. B. Co., 86 Cal. 617, [25 Pac. 174]; *Southern California L. Co. v. Jones*, 133 Cal. 242, [65 Pac. 378]; *Dingley v. Greene*, 54 Cal. 333.

There is no allegation in the complaint that the contract between the owner and the contractor was for an amount exceeding one thousand dollars, and therefore the contract was not such a one as is required to be in writing and recorded, and the whole contract price may have properly been payable in advance, or in such installments and at such times as the owner and contractor may have agreed upon. (*Southern California L. Co. v. Jones*, 133 Cal. 242, [65 Pac. 378].)

Judgment is reversed.

Cooper, J., and Harrison, P. J., concurred.

[No. 41. First Appellate District.—September 7, 1905.]

FANNIE DALLMAN, Appellant, v. J. J. FRANK et al.,
Executors of the Will of Lissette Chesney, Deceased,
Respondents.

ESTATES OF DECEASED PERSONS—ACTION AGAINST EXECUTORS—GRATUITOUS SERVICES.—An action cannot be sustained against the executors of the will of a deceased person for services which are shown to have been gratuitously rendered to the deceased during her illness, by way of friendly and neighborly offices voluntarily given by plaintiff of her own motion, without request therefor by the deceased.

ID.—SUPPORT OF FINDINGS—INFERENCES FROM EVIDENCE.—The findings of the court will be upheld if there is any evidence which by reasonable construction will support them, and the trial court is authorized to consider not only the testimony, but also all reasonable inferences of fact which can be reasonably drawn from the facts established by such testimony. *Held*, in view of all the evidence, that the court might reasonably infer from the friendly relations long existing between plaintiff and deceased that there was no employment of plaintiff, that her services were of a friendly and social nature, and that a finding that they were gratuitous and without expectation of reward cannot be said to be without support in the evidence.

ID.—PRESUMPTION OF CONTRACT OVERCOME.—The presumption of a contract, which the law implies upon proof that one has rendered

services to another, in the absence of any showing of the circumstances under which they were rendered, ceases to exist when it is shown that they were merely such offices as one friend would perform for another in time of sickness or distress, either by way of physical aid or in the comfort of personal companionship.

ID.—IMMATERIAL FAILURE TO FIND VALUE OF SERVICES.—After finding that the services rendered were gratuitous, the issue respecting the value of the services became immaterial, and the failure to make a finding thereupon was not error.

ID.—HARMLESS EVIDENCE—WILL OF DECEASED.—Under such finding, the admission in evidence of the will of the deceased containing bequests to plaintiff is harmless.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The main facts are stated in the opinion of the court. The will introduced in evidence showed that deceased had bequeathed all of her household furniture to the plaintiff, and by a codicil had bequeathed to her five hundred dollars in cash.

E. A. Bridgford, for Appellant.

Lucius L. Solomons, for Respondents.

HARRISON, P. J.—The plaintiff brought this action to recover \$915 from the defendants as executors of the last will and testament of Lissette Chesney, deceased, as the reasonable value of services alleged to have been rendered to the decedent in her lifetime at her special instance and request. The defendants in their answer do not deny that services were rendered by the plaintiff to the decedent, but they allege that whatever services were so rendered were mere friendly and neighborly offices performed by the plaintiff of her own accord, and were rendered voluntarily and gratuitously, and for which no promise of payment was ever made by the decedent either expressly or by implication. Upon the trial of the cause the court found that the services were not rendered at the instance and request of the deceased, but were performed by the plaintiff voluntarily and gratuitously of her own motion, and were acts of friendship having no pecuniary value. Judgment was thereupon rendered in favor of the defendants, from which and from an order deny-

ing her motion for a new trial the plaintiff has appealed, and urges in support of the appeal that the above findings of the court were not sustained by the evidence.

The findings of a court, like the verdict of a jury, will be upheld in the appellate court if there is any evidence which, by reasonable construction, tends to support such findings; and in making its decision the trial court is at liberty to take into consideration not only the testimony given at the trial but also all inferences of fact which may be reasonably drawn from the facts established by such testimony. Upon an appeal the burden is upon the appellant to show error in the court below, and although the appellate court may be of the opinion that, on the evidence in the record, it would have reached a different conclusion, it is not for that reason authorized to set aside the findings of the trial court. If the evidence is such that reasonable men may reach different conclusions thereon, the findings of the trial court must be sustained.

The main issue before the superior court was the character of the services rendered the deceased,—the plaintiff seeking to show that they were rendered under employment as a nurse, and the defendants that they were merely friendly offices gratuitously performed.

It appears from the evidence that Mrs. Chesney lived in the upper flat of a building on Sixth Street, of which she was the owner, and that the plaintiff with her husband and family lived in the flat immediately beneath, and had lived there for several years as the tenant of Mrs. Chesney and of her husband in his lifetime. During this period the families of the plaintiff and of Mrs. Chesney appear to have been on friendly and social terms, frequently visiting each other in their respective apartments. Upon the lower floor of the building there was a saloon, which had been occupied by Mr. Chesney in his lifetime. He died in February, 1899, and after his death Mrs. Chesney carried on the business with the aid of the employees which he had had during his lifetime. She had been troubled with asthma for several years, and in the latter part of August, 1899, she was taken seriously ill, and died in October of that year.

The evidence of the services rendered by the plaintiff relates to two periods of time,—the first from the time of Mr.

Chesney's death until the latter part of August, when Mrs. Chesney was taken ill, and the other from that time until her death. There was no testimony of any direct employment of the plaintiff, but her husband testified with reference to the first of these periods that on the day that Mr. Chesney died Mrs. Chesney "sent for" his wife "to come to her aid"; and that he "told her to go"; but the terms of the message or the character of the aid requested was not shown; and although he purported to state their character, his testimony thereon was greatly impaired by his subsequent statement that during this time he was occupied in his store, and had not the slightest idea of what his wife did with Mrs. Chesney during the day, thus leaving the court to consider this portion of his testimony as mere hearsay. His testimony, and that of other witnesses for the plaintiff, that during this period the plaintiff devoted the whole of her time to the care of Mrs. Chesney; that Mrs. Chesney could not get out of her room to get anything, and that for that reason she required the plaintiff to wait on her; that the condition of Mrs. Chesney was such as to require her continuous services, was in direct conflict with the testimony of the employees in the saloon that during this period Mrs. Chesney came into the saloon every morning and evening two or three times a day, attending to her business there, and would remain sometimes two hours at a time; and also with the testimony of one of the defendants that he visited her during this period at different hours of the day, morning, afternoon, and evening, nearly every day, and found her in her office attending to her business; that during this period he had never seen the plaintiff in the apartments of Mrs. Chesney, and with one or two exceptions had never seen her with Mrs. Chesney, and had never seen her doing anything for Mrs. Chesney.

When Mrs. Chesney was taken ill in August a physician was called to attend her, who visited her daily from that time until her death, and during that period she also had the attendance of two nurses, one in the daytime and the other during the night. The only testimony of any specific service rendered by the plaintiff during this period was that given by the day nurse, to the effect that the plaintiff visited the sickroom nearly every day at different hours in the day, and was there on an average about an hour and a half each day;

and that while there she would sit by the side of Mrs. Chesney and fan her and rub her with alcohol. The nurse, however, said that she did this of her own accord and without any request. The night nurse testified that the plaintiff was in the room every night; that Mrs. Chesney often wanted her to sit there, and that she would sit by her and talk to her and comfort her. She did not testify that any services were rendered by the plaintiff other than those of comfort. The attending physician, who visited Mrs. Chesney several times each day during her illness, stated that he would not say that the plaintiff was acting as a nurse, but that she was giving such care as a well woman might extend to a sick woman; that she was a great moral comfort to Mrs. Chesney, besides the physical aid she extended to her. The defendant Frank testified that during this period he visited Mrs. Chesney every day and night, and remained there sometimes an hour, and sometimes longer, and at times had remained all night; that he saw the plaintiff there nearly every time he went, but that he never saw her doing anything other than to sit there and fan Mrs. Chesney and rub her hands.

It may be assumed that, in determining the issues before it, the superior court took into consideration the friendly relations shown to have existed between the plaintiff and Mrs. Chesney, and that it made the reasonable inference therefrom that the message from Mrs. Chesney to the plaintiff on the day of her husband's death to come to her aid was rather a request for the comfort of a companion in her affliction than for the purpose of giving employment to the plaintiff; that much of the testimony given on her behalf was either hearsay or the opinion of the witnesses, and was in many essential respects contradicted by other witnesses; the absence of any direct evidence that the plaintiff had rendered any specific services as a nurse to Mrs. Chesney prior to her last sickness; that, by reason of evidence of the physical ability of Mrs. Chesney to care for herself during the period prior to her illness, and her employment of two experienced nurses during her illness, she was under no necessity of asking for the services of the plaintiff; that the services shown to have been rendered by the plaintiff during the illness of Mrs. Chesney were friendly and social merely. In thus considering their nature its finding that the services were gratuitous and with-

out any expectation of reward cannot be said to be without evidence for its support. The presumption of a contract, which the law implies upon proof that one has rendered services to another, in the absence of any showing of the circumstances under which they were rendered, ceases to exist when it is shown that they were merely such offices as one friend would perform for another in time of sickness or distress, either by way of physical aid or in the comfort of personal companionship. (See *Moulin v. Columbet*, 22 Cal. 508.)

After finding that the services rendered by the plaintiff were gratuitous the issue respecting the value became immaterial, and the failure to make a finding thereon was not error. For the same reason the plaintiff suffered no harm from the admission in evidence of Mrs. Chesney's will.

The judgment and order are affirmed.

Hall, J., and Cooper, J., concurred.

[No. 33. First Appellate District.—September 8, 1905.]

LAURA LE TOURNEUX, Respondent, v. GEORGE P. GILLISS et al., Defendants; EZEKIEL WILSON, Appellant.

NOTE—ILLEGAL CONSIDERATION—LOBBYING CONTRACT—PUBLIC POLICY.—

A promissory note given to raise money for the purpose of carrying out a contract between the maker and payee for lobbying is given for a contract against public policy, which renders the consideration illegal.

ID.—DEFINITION OF "LOBBYING."—The term "lobbying" has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body in the lobby or elsewhere for the purpose of influencing their votes. The term is not used in any good sense.

ID.—PENAL OFFENSE NOT MATERIAL.—It is not material that the contract does not provide for acts to be done within the penal provisions of the constitution and the Penal Code. It is sufficient that it was the object and purpose to provide means to enable the maker of the note to carry on the business of lobbying. It is not the policy of the law that the members of the legislature during the session should be subjected to the personal solicitation of experienced and paid lobbyists.

Id.—CONTRACTS NOT AIDED BY COURTS.—Courts will not permit themselves to be used for the purpose of aiding or enforcing such contracts, and this cannot be made the basis of any action, legal or equitable.

Id.—TRANSFER OF ILLEGAL NOTE—PRESUMPTION—BURDEN OF PROOF.—Where it is clearly proved that the consideration of the note was illegal and that the payee was a party to the illegal contract, and the note is sued upon by a transferee of the payee, the law presumes that the transferee suing upon the note stands in the shoes of the payee, and the burden of proving a *bona fide* purchase for value without notice rests upon the holder.

Id.—ORDER GRANTING NEW TRIAL—SURPRISE—MISTAKE OF LAW.—An order granting a new trial on account of the surprise of the holder, which consists only of a mistake of law as to the burden of proof, which was supposed to rest on defendant, to prove that plaintiff was not a *bona fide* holder for value, cannot be justified.

Id.—TRIAL—PARTIES AT SWORDS' LENGTH.—Upon the trial of a cause the parties are at swords' length, and each one relies upon his own knowledge of the law, and the evidence which he deems essential.

Id.—LACHES—APPLICATION AFTER JUDGMENT.—One who would apply for relief on the ground of mistake of law, must apply before judgment to have the submission set aside upon terms, and it is too late to make the application after decision and judgment, as ground for new trial.

Id.—PRESUMPTION IN FAVOR OF ORDER—ABUSE OF DISCRETION.—Though in general all presumptions are in favor of an order granting a new trial, yet where it is granted without any legal reason for so doing the court's discretion has been abused.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Drown, Leicester & Drown, for Appellant.

Charles F. Hanlon, for Respondent.

COOPER, J.—This action was brought to recover upon a promissory note for five hundred dollars made by defendants Wilson and Gilliss to Thomas Eager, the father and assignor of plaintiff. The note was executed for money to be advanced by Eager to Gilliss. Defendant Wilson received no consideration for signing the note, but signed at the request of Eager

and as surety for Gilliss. Wilson alleged as a defense that the consideration for the note was a lobbying contract, which was illegal, against public policy, and void.

The court found in favor of Wilson on such affirmative defense.

Thereafter plaintiff proposed a statement on motion for a new trial, which was allowed and settled by the Hon. Edward A. Belcher, the judge who tried the case. The motion came on for hearing before Hon. Thomas F. Graham, the term of the judge who tried the case having expired, and was granted. From the order granting a new trial this appeal is taken

It is contended, in support of the action of the court in granting the motion, that the evidence was not sufficient to support the findings and judgment, and that for this reason, if for no other, the order is correct.

This leads us, necessarily, into an examination as to whether or not the consideration for the note was illegal and against public policy. The answer alleges that, under the laws of this state, a regular session of the legislature was held in the city of Sacramento commencing on the first Monday after the first day of January, 1897; that prior to the commencement of the session, in the month of December, 1896, defendant Gilliss requested Eager to advance and loan to him sufficient moneys to enable him to go to Sacramento, and there to remain during the coming session of the legislature, and carry on the business of lobbying and soliciting the votes of members of the legislature for or against such bills or legislative measures as might affect the interests of said Gilliss or those by whom he should be employed; that such occupation or business of lobbying consisted in influencing or seeking to influence, by secret or corrupt means, the votes of the several members of the legislature in connection with or concerning such bills or legislative measures as might come before said legislature for passage or action, and as the said Gilliss or those by whom he might be employed should be interested in; that in consideration of these matters, and for the sole purpose of enabling the said Gilliss to go to Sacramento and carry on the said business of lobbying during the said session of the legislature, Eager agreed to advance and loan to Gilliss the necessary funds upon the said Gilliss executing the note in controversy with defendant Wilson as surety thereon;

that on the said agreement and understanding, and solely for the purpose of enabling said Gilliss to get said money for the purpose of lobbying, the said note was signed by defendant Wilson, all of which was known by said Eager; that both Gilliss and said Eager attended the said session of the legislature, and engaged in the business of lobbying during the session, and co-operated together and shared the profits of such business.

The evidence in support of the allegations of the answer is found principally in the deposition of defendant Wilson, and is without conflict. It shows in substance that Eager and Gilliss came to defendant Wilson and stated that they wanted to go to Sacramento and engage in the lobbying business; that Gilliss was without money, and that Eager would furnish the money if Wilson would sign the note. The money was to be expended for Gilliss's expenses in lobbying. Eager said that Gilliss had had a great deal of experience, and that the two would make a strong team in Sacramento. He told Wilson that the money was to be used for the purpose of paying the expenses of lobbying at Sacramento, and that he would advance the money to Gilliss for such purpose. Wilson said that by lobbying they meant influencing the legislature to vote for a bill or against it, in any way that the vote of the legislator could be reached, and that it was distinctly understood that the money to be advanced on the note was to be used only for the purpose of lobbying.

The witness Rogers testified that he saw Gilliss at Sacramento when the legislature met, and that he stayed with witness and Eager off and on until the legislature adjourned; that "Gilliss and Eager were working together; they were up there lobbying for different measures, doing work for anybody they could get it to do for, I think they together had some work for the railroad company there." The witness further testified that they (Eager and Gilliss) asked him to help them with the "scalpers' bill," and that "Gilliss's business there was well known to everybody, for he was there to look after the affairs of the railroad company, and Mr. Stowe sent him up there, which is a fact, to attend to any business of the railroad company before the legislature."

The witness Wilcox testified that Eager wanted him (the witness) to introduce Eager to members of the legislature;

and that he introduced both Eager and Gilliss to various members; that they (Eager and Gilliss) agreed to pay witness for his services in introducing them to the friends and members and for his conversation favorable to the bill they had up, and that they did make him two small payments at the Lick House in San Francisco after the session closed.

Counsel for respondent contends that lobbying may be lawful, legal, and honorable, provided secret and corrupt means are not resorted to, and that the evidence does not show that any member of the legislature was approached by secret or corrupt means. Our constitution provides (art IV, sec. 35): "Any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying, which is hereby declared a felony"; and section 89 of the Penal Code provides: "Every person who obtains or seeks to obtain money or other thing of value from another person, upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony." We cannot adopt the views of counsel for respondent as to the word "lobbying" being used in a "good sense."

The term "lobbying" has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body in the lobby or elsewhere with the purpose of influencing their votes. (Black's Law Dictionary; *County of Colusa v. Welch*, 122 Cal. 431, [55 Pac. 243].) It makes no difference that the contract did not provide for acts to be done within the prohibition of the constitution. It was the object and purpose of the parties in giving the note to provide means to enable Gilliss to engage in the business of lobbying. He would not be presumed to engage in the business without compensation from the parties desiring his services. It is not the policy of the law that the members of the legislature should be subjected to the personal solicitation during the session of experienced and paid lobbyists. Men who are paid to influence legislation, and who become acquainted with and cultivate the friendship of members through dinners, wines, cigars, and personal attention are certainly not assisting the state in procuring good legislation.

If such men escape public prosecution, it is no reason that the time of the courts should be taken up in aiding and assisting them in relation to their nefarious business. Courts will not permit themselves to be used for the purpose of aiding or enforcing such contracts. If such persons escape punishment through a public prosecution, they may consider themselves fortunate.

In the early case of *Martin v. Wade*, 37 Cal. 168, it was held that a promissory note given for moneys loaned to the promisor for the purpose of enabling him to pay the expenses of securing his election to a public office is void, because the consideration was against public policy. The court quoted the language of Mr. Chief Justice Wilmot in *Collins v. Blantern*, 2 Wils. 341: "You shall not stipulate for iniquity. All writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again. You shall not have a right of action where you come into a court of justice in this unclean manner to recover it back."

In *County of Colusa v. Welch*, 122 Cal. 428, [55 Pac. 243], it was held that the board of supervisors of a county had no authority to employ special counsel for the purpose of influencing members of the legislature with respect to pending legislation affecting the interests of the county. The court said: "The statute making certain lobby practices criminal does not by implication legalize others not within the purview of the criminal law, which are void as against public policy. . . . The language of the complaint is, as before stated, as follows: That if the sum of one thousand dollars was agreed to be paid to Sprague, it was to secure, by means of personal solicitation and by means of private interviews with members of the legislature of California, and by means of lobbying, the defeat of said senate bill. These allegations bring the case within the rule enunciated by Cooley as being void. The term lobbying has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body in the lobby or elsewhere for the purpose of influencing their votes."

In *Ball v. Putnam*, 123 Cal. 134, [55 Pac. 773], the action

was upon a promissory note. It appeared that the note had been given for money to be used in connection with the division of Colusa County and the creation of Glenn County therefrom. While the case was reversed for erroneous ruling, the court said: "There is evidence in the record tending to show that the contract which lay at the bottom of all the transactions between these parties was a contract void as against public policy. Not enough appears to justify this court in saying that such is the fact, but enough appears to call for rigid inquiry by the trial judge, and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor the consent of the parties to it justifies the court in retaining jurisdiction of such action."

It is unnecessary to further discuss the authorities, but the following are a few of the many that sustain the proposition: *Dunham v. Hastings Pavement Co.*, 67 N. Y. Supp. 632, [56 App. Div. 244]; *Tool v. Norris*, 69 U. S. 45; *Sweeney v. McLeod*, 15 Or. 330, [15 Pac. 275]; *Kansas Pacific Ry. Co. v. McCoy*, 8 Kan. 538; *Chippewa V. and S. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224, [44 N. W. 17]; *McDonald v. Buckstaff*, 56 Neb. 88, [76 N. W. 476]; *Rose v. Truax*, 21 Barb. 361; *Powers v. Skinner*, 34 Vt. 274, [80 Am. Dec. 677].

The defendant Wilson having proven that the consideration for the note was illegal, the law immediately presumed that the plaintiff stood in the shoes of Eager, and the burden of proving that she was a holder in good faith and for value was then cast upon her. (Daniel on Negotiable Instruments, 4th ed., sec. 769a, p. 766; *Fuller v. Hutchings*, 10 Cal. 523, [70 Am. Dec. 746]; *Graham v. Larimer*, 83 Cal. 173, [23 Pac. 286]; *Jordan v. Grover*, 99 Cal. 194, [33 Pac. 889].) It is therefore evident that the defendant Wilson introduced ample evidence to support the judgment in his behalf.

Respondent contends that the court was justified in granting the motion for a new trial on the ground of surprise. We have carefully read the affidavits, and our opinion is that no such surprise is shown as would in law justify the order. The surprise, as stated by counsel in his brief, is: "On the

trial of facts in the lower court the judge [Belcher] and counsel led us to believe that unless defendant Wilson assumed the burden and proved affirmatively that plaintiff knew the facts of the defense of bad consideration, the judgment would be entered in favor of plaintiff for the amount due on her note, and thus stopped plaintiff from introducing her depositions on file, by which she could prove her innocence, provided the law required her to assume such a burden. Judge Graham holds such a course of fooling an attorney warrants the granting of a new trial."

It appears from the record that when defendant's counsel was introducing evidence to prove that Eager and Gilliss were engaged in lobbying in Sacramento plaintiff's counsel stated that he would object to the evidence as immaterial unless the defendant could prove affirmatively that plaintiff knew of it. The judge remarked that the objection would be good unless plaintiff was connected with it. Thereupon plaintiff's counsel said, "Does counsel promise that my client knew of this that the witness is testifying?" Counsel for defendant replied, "We expect to show that to a certain extent." Counsel for plaintiff replied, "On that promise all right." Counsel for Wilson replied, "If it is necessary for us to prove that we will prove it." The judge remarked that the testimony would "have no materiality unless there is a connection made."

Then, after the testimony on behalf of Wilson was closed, the following proceedings took place:—

"Counsel for plaintiff.—Where is your testimony that you promised the court that my client knew all about it?

"Counsel for defendant.—I rest.

"Counsel for plaintiff.—I submit counsel has not kept his promise. I move to strike out the testimony of Wilcox and Rogers on the ground that this testimony was let in on the promise to the court that he would supply the proof, connecting the plaintiff with the testimony showing that she knew the facts.

"Counsel for defendant.—I desire to be heard on that; that is the very point.

"The Court.—Counsel desires to be heard on that. Have you any further rebuttal testimony?

"Counsel for plaintiff.—I move to strike out the testimony

of these two witnesses. There are two depositions, being plaintiff's and Mr. Eager's, on file not read. I move to strike out the testimony of Mr. Wilcox and Mr. Rogers.

"The Court.—I understand that—

"Counsel for plaintiff [interrupting].—I want a decision on that.

"The Court.—That will be taken under advisement.

"Counsel for defendant.—I don't want to be heard in the matter till we close the case.

"Counsel for plaintiff.—The authorities I have—

"The Court [interrupting].—I would like to have you produce the matter in writing. Are the proofs in?

"Counsel for plaintiff.—I would like a decision on this motion before I determine whether I read the deposition or not. I think your honor will rule with me.

"The Court.—If I pass on the matter now I will deny the motion. I will pass on it now and deny it.

"Counsel for plaintiff.—Take an exception. I will rest my case. The depositions show she bought this note for value.

"Counsel for defendant.—Do you rest?

"Counsel for plaintiff.—Yes, sir."

The above does not show that counsel was surprised or lulled into a belief that a certain thing existed by which he was deceived. Counsel for defendant introduced sufficient evidence to shift the burden upon plaintiff to show that she was a holder of the note in good faith without notice. He had not promised to introduce more. The court ruled against plaintiff on the motion to strike out. Not only this, but plaintiff's counsel was asked both by the court and the defendant's attorney if the proofs were in and if he rested. He was not deceived as to any fact or as to the rulings made. He evidently entertained the view, and acted upon it, that the defendant had to prove that plaintiff had knowledge of the consideration for the note, and that such consideration was illegal. He was mistaken in this view of the law, but that was no ground for relief after the case had been finally submitted and decided. No doubt if he had asked within a reasonable time after the submission to have such submission set aside upon terms, and had made a proper showing, the trial judge would have relieved him. But in the trial of cases counsel deal at swords' length. Each one relies upon his own

knowledge of the law and the evidence which he deems essential. If, after a case had been submitted and decided, the losing party could have the judgment set aside because he acted upon an erroneous view of the law there would be no end to litigation. There have been times no doubt in the experience of every lawyer when he would have liked to have been relieved of a situation brought about by his failure to do the proper thing at the proper time. But after judgment it is too late for relief on such ground. (*Fuller v. Hutchings*, 10 Cal. 523, [70 Am. Dec. 746]; *Santa Cruz R. P. Co. v. Bowie*, 104 Cal. 287, [37 Pac. 934].)

In the above discussion we have considered the affidavits, without passing upon the objection that they are not properly authenticated.

It was not prejudicial error to allow the witness Wilcox to testify to the effect that Eager told him while in Sacramento that he was engaged in the business of lobbying. Declarations of Eager would be admissible against himself, and we cannot say they would not be admissible as against plaintiff, if plaintiff is conceded to have known the illegality of the consideration and the purposes for which the note was given. Not only this, but the witness testified elsewhere without objection that he saw Eager and Gilliss almost every day talking to members, entertaining them with drinks, cigars, and dinners, and that they employed witness in connection with the "scalpers' bill." His language is: "I was employed first to introduce them to all the members I knew, and, secondly, to 'feel' all the members how they stood on the proposition, whether for or against it, and whether they could be 'persuaded' or not." It thus appears, without the declarations of Eager, that he was at Sacramento engaged in lobbying.

The material question was as to the consideration for which the note was given. Concerning this there is no conflict. As to whether the parties carried out their agreement to conduct a lobbying business or not is not very material.

We have not overlooked the fact that all presumptions are in favor of the order made by the trial court; that if it can be affirmed here upon any statutory ground included in the notice and properly in the record it will be done; and that it must appear that the court abused its discretion in making

the order. But where the court grants a new trial without any legal reason for so doing its discretion has been abused. The order is reversed.

Hall, J., and Harrison, P. J., concurred.

[No. 37. First Appellate District.—September 11, 1905.]

GEORGE HAUB, Respondent, v. CHARLES FRIERMUTH, Appellant.

SLANDER—CHARGE OF MURDER—WORDS ACTIONABLE PER SE—PRESUMPTION OF MALICE.—A complaint alleging that the defendant spoke of and concerning plaintiff in the presence of a person named and divers other persons words importing that defendant has proof that the plaintiff was guilty of the murder of a person named, states words that are actionable *per se*, and if false they are presumed to have been spoken with malice.

ID.—ALLEGATA AND PROBATA.—The words spoken must be set out in the complaint, that the defendant may have notice of the particular charge which he is required to answer; and the words proved to have been spoken, though they need not correspond with precision to the identical words set forth, must be in substance the same, or have substantially the same meaning, and enough of them must be proved to sustain his cause of action. The *allegata* and *probata* must substantially correspond, and plaintiff is not entitled to recover upon proof of words not set forth, or upon a failure to prove the slanderous words alleged in the complaint.

ID.—GRAVAMEN OF CAUSE OF ACTION—FAILURE OF PROOF.—Where, notwithstanding the use of other words in the complaint which are not slanderous *per se*, the gravamen of the cause of action is that defendant had proof that plaintiff was guilty of the murder of the person named, proof that defendant had spoken the other words and that his words did not contain any direct charge of killing or murder, and that he used other expressions not corresponding with the words spoken in the complaint, and not containing such direct charge, is insufficient to authorize a recovery.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

George M. Hurlbut, and P. R. Land, for Appellant.

John B. Carson, for Respondent.

HARRISON, P. J.—Action for slander.

Judgment was rendered in favor of the plaintiff for one thousand dollars damages, and the defendant has appealed.

In his complaint the plaintiff alleges that the defendant spoke of and concerning him in the presence of one Gibson and divers other persons the following defamatory words, viz.: "I have a man to prove that George Haub struck Richard Schwartz in front of his place of business; that he had two witnesses who had tracked the bloodstains from Haub's shop to the place where Schwartz fell unconscious, and that he had proof that Haub was guilty of the murder of Schwartz." The words thus alleged to have been spoken by the defendant are actionable in themselves, and if false are presumed to have been spoken with malice.

The slander for which a civil action is authorized is defined in section 46 of the Civil Code, and the plaintiff's cause of action herein is based upon subdivision 1 of that section, which declares that a publication other than libel which falsely charges any person with crime constitutes slander. The complaint in such action may specify the crime alleged to have been imputed to the plaintiff, accompanied by the words in which the crime was charged, or it may merely set forth the words alleged to have been spoken; but in either case it must appear from the words themselves, aided, if necessary, by proper averments of their meaning and application, that the defendant charged the plaintiff with a crime. It is not sufficient to merely allege that he charged the plaintiff with having committed a certain designated crime. The words must be set out in the complaint that the defendant may have notice of the particular charge which he is required to answer.

The rule is of long standing that to authorize a recovery in such action the plaintiff must prove the utterance of the words set forth in his complaint, or enough of them to show that the defendant charged him with the particular offense constituting the slander. He is not required to reproduce

with literal precision the identical words set forth in his complaint, but those which are proved to have been spoken must be in substance the same or have substantially the same meaning. Equivalent words or words of similar import will be insufficient; nor will his cause of action be sustained by proof of words that might produce an impression similar to that which the words alleged would produce. The words shown to have been spoken by the defendant are to be construed by their own meaning and import, and not by any impression which the hearer may receive from them, unless it is both shown by proper averments in the complaint and by evidence at the trial that the defendant intended by their use to create such impression. Neither is he required to prove all of the words set forth in his complaint unless all are essential for establishing the slanderous charge, but he must prove enough of them to sustain his cause of action. In actions for slander the rule that the *probata* must correspond with the *allegata* is eminently applicable. The plaintiff is not entitled to a recovery upon proof of words not set forth in his complaint, or upon a failure to prove the slanderous words which he has alleged. It is unavailing that the evidence is such as would authorize a jury to find that the defendant intended to charge the plaintiff with the crime; their function is to determine whether he spoke the words alleged in the complaint. These principles will find support in the following authorities: 2 Greenleaf on Evidence, sec. 414; Townshend on Slander and Libel, secs. 365, 369, 371; Newell on Slander and Libel, p. 804; 13 Ency. of Plead. & Prac., p. 62 et seq.; *Fox v. Vanderbeck*, 5 Cow. 513; *Ward v. Dick*, 47 Conn. 300, [36 Am. Rep. 75]; *Wilbur v. Odell*, 29 Ill. 456; *Schmisser v. Krelich*, 92 Ill. 347; *Ransome v. McCurley*, 140 Ill. 626, [31 N. E. 119]; *Sword v. Martin*, 23 Ill. App. 304; *Irish American Bank v. Bader*, 59 Minn. 329, [61 N. W. 328]; *Payson v. Macomber*, 3 Allen, 69; *Chace v. Sherman*, 119 Mass. 387; *Bassett v. Spofford*, 11 N. H. 127; *Merrill v. Peaslee*, 17 N. H. 540.

At the trial the witness Gibson referred to in the complaint testified: "The defendant stated to me that 'we' I think or 'they'—I am not positive as to the words—have a witness that saw Mr. Haub strike Mr. Schwartz; that they had a witness that saw Mr. Haub in his own butcher-shop,

and that they also had a witness that followed Mr. Schwartz up the street as he staggered up the street. He said that Mr. Schwartz fell at the corner of the street, Union and Laguna, and there was a witness that had traced the blood back to the butcher-shop." On cross-examination he gave the language of the defendant as follows: "He stated that 'they' or 'we' had a witness that had seen Mr. Haub strike Mr. Schwartz; he said he was struck in the butcher-shop and that they had a witness that saw Mr. Haub strike this man. He said there was a witness that had followed Mr. Schwartz up the block and saw him stagger all the way and fall at the corner; and also that there were two witnesses that had traced the blood back to the butcher-shop." Another witness (Nuhrenburg) testified that in a conversation with the defendant, in which he suggested that Schwartz had died of heart disease, the defendant replied, "No, I don't believe he had heart disease; somebody hit him because he had a hole in the back of his head,"—and upon the witness expressing a doubt the defendant replied, "You know that Mr. Haub and Mr. Schwartz had some business troubles and it is George Haub that hit him." Being asked if he was sure he said those words, the witness replied, "Yes, sir; he did not say 'killed' or 'murdered,' but he said 'hit' him."

The gravamen of the plaintiff's cause of action is, that the defendant falsely charged him with the murder of Schwartz; and to authorize a recovery it was necessary to prove that the defendant had spoken the words set out in the complaint in which that charge was made, viz.: "That he had proof that Haub was guilty of the murder of Schwartz." If the complaint had not set out these words, or contained an allegation that they were spoken by the defendant, it would have failed to state a cause of action, since the other words do not of themselves, or by reason of any averments in the complaint, charge the plaintiff with the commission of a crime; and proof that the defendant had spoken only those other words was equally insufficient to authorize a recovery. There is nothing in the testimony above quoted, or elsewhere in the record, which indicates that the defendant said that he had proof that Haub was guilty of the murder of Schwartz, or that he uttered any words substantially the same; and there was the direct testimony of Nuhrenburg that in his conversa-

tion with him the defendant did not use the words "killed" or "murdered."

The only testimony that the defendant, in any words spoken by him, associated the plaintiff with the death of Schwartz was that of the witness Wulzen that the defendant said to him, "Mr. Haub might have killed him anyhow," and of the witness Fanning that he said, "If you will follow up Haub pretty close you will find that this man's death came that way," and "he might have something to do with it," and the above testimony of Nuhrenburg. The testimony of Gibson that the defendant said to him that "the Schwartz case was a murder," did not connect the plaintiff with the words.

None of these expressions, however, correspond with the words set forth in the complaint, or contain words substantially the same in sense. It may be added, although irrelevant to the decision herein, that if they had been set forth in the complaint in addition to the words therein given they are conditional and argumentative in form, and do not constitute a direct charge that the plaintiff had committed any crime.

It must be held, therefore, that the evidence presented by the plaintiff was insufficient to sustain his action or to justify the verdict of the jury. It was not a case of variance, as suggested by the respondent, but was a failure of proof to sustain his allegation. (Code Civ. Proc., sec. 471.)

The judgment and order appealed from are reversed.

Cooper, J., and Hall, J., concurred.

[No. 49. First Appellate District.—September 11, 1905.]

C. P. DOE, Respondent, v. CHARLES R. ALLEN, Appellant.

ASSUMPSIT—CONFLICTING EVIDENCE—SUPPORT OF FINDINGS.—In an action of assumpsit, where there is a substantial conflict in the evidence, and findings for the plaintiff are supported by sufficient evidence tending to sustain them, this court will not interfere with the action of the trial court.

ID.—FINDING AS TO DATE.—A finding that the promise was made on or about the date alleged in the complaint is sufficiently sustained by evidence that it was made on that date, and conflicting evidence that it was made on the day next previous thereto. The court was not required to choose absolutely between the two dates.

ID.—ORIGINAL VERBAL PROMISE—CONSIDERATION—STATUTE OF FRAUDS.

—A verbal promise by a purchaser who had paid the purchase money on a cargo of coal consigned to him, to pay the freight to the carrier if it should be delivered free of lien for the freight (which the agents of the consignor had failed to pay) and on faith of which promise the carrier delivered the cargo, is an original promise resting upon a consideration beneficial to the promisor, and is not required to be in writing under sections 1624 and 2794 of the Civil Code.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

T. C. Coogan, for Appellant.

Charles E. Naylor, for Respondent.

HALL, J.—This is an appeal by defendant from a judgment and order denying his motion for a new trial.

The complaint sets forth two causes of action, the first count alleging that defendant became indebted to plaintiff on the nineteenth day of December, 1899, in the sum of \$747.95 for freight money upon a cargo of coal that day delivered by plaintiff to defendant at his (defendant's) special instance and request, which said defendant promised to pay in consideration of the delivery by plaintiff to defendant of said cargo of coal.

The only points presented by the appeal concern the first cause of action.

The first point urged is, that "The evidence is insufficient to justify or sustain the finding and decision contained in paragraph 1 of the findings of fact herein:

"1st:—That on or about December 19th, 1899, plaintiff delivered from steamer Alice Blanchard to defendant, at the special instance and request of defendant, at the city and county of San Francisco, state of California, a cargo of coal, upon consideration of defendant's promise to pay the freight money thereon;

"2d:—That defendant promised on or about said day to pay plaintiff the freight money due thereon."

The plaintiff, among other things, testified that in December, 1899, he brought a cargo of coal to San Francisco on the steamer *Alice Blanchard*, arriving here about December 18th, and consigned to Charles R. Allen. That on the eighteenth day of December he called upon the agents of the consignors with reference to the freight money. They did not pay, and, continuing, the witness said: "On that day I had a conversation with Charles R. Allen with reference to freight money on this cargo of coal. I telephoned to Mr. Allen on the morning of the 18th. I asked him if he would pay the freight if we delivered it. He answered back stating that he would. This telephone message was sent from the telephone of Messrs. Byxbee & Clark's office" (agents of the consignors). He further testified that the conversation was held during the morning of the 18th at a time when but few tons of coal had been discharged and that the discharge of the coal was finished at half-past twelve December 19, 1899. and that he delivered the coal because defendant agreed to pay the freight.

The above testimony supports the findings. It is true that defendant gave testimony which contradicts the testimony of plaintiff, and counsel for appellant has called our attention to alleged contradictions and improbabilities in the testimony of plaintiff. But these were matters to be solved by the trial court; and where there is a substantial conflict in the evidence such as is presented in this case, this court will not interfere with the action of the lower court in regard thereto.

Evidence that the promise was made on the eighteenth day of December, 1899, was sufficient to support the finding that "defendant promised on or about said day [December 19, 1899] to pay plaintiff the freight money due thereon." Whether or not the telephonic conversation occurred on the eighteenth or nineteenth day of December, under the condition of the evidence in this case, went to the evidentiary value of the respective testimony of plaintiff and defendant as to that conversation; but the court was not required, as is claimed by appellant, to make a finding as to which of the two days the promise was made upon.

Appellant urges as ground for reversal the failure of the court to rule upon a motion made by defendant to strike out the answer of plaintiff as follows: "I telephoned to Mr. Allen on the morning of the 18th. I asked him if he would pay the freight if we delivered it. He answered back stating that he would. This telephone message was sent from the telephone in Messrs. Byxbee and Clark's office." The motion to strike out was made upon the ground that the answer of the witness showed upon its face that it was a promise within the statute of frauds, and the court said, "I will reserve my ruling." Conceding for the purpose of this decision that a failure to pass on such a motion is reversible error (*City of Stockton v. Dunham*, 59 Cal. 609; *Raymond v. Glover*, 122 Cal. 471, [55 Pac. 398]), and passing the point that nowhere in the assignment of errors contained in the statement on motion for a new trial is the failure to pass upon this particular motion assigned as error, we find that later on, at the close of the evidence for plaintiff, the defendant "moved the court to strike out all *testimony of plaintiff stating the alleged contract made over the telephone* on the ground that said contract fell within the application of the statute of frauds, and that said testimony was inadmissible." This motion the court denied, and to this ruling defendant duly excepted. It will thus be seen that the defendant renewed his motion and obtained a ruling. The testimony referred to in the last motion is the identical testimony given in the answer of plaintiff above set forth. It therefore cannot be said that the court did fail to rule on defendant's motion.

The vital question, however, presented by the appeal concerns the application of the statute of frauds, and is raised by several objections to testimony given by plaintiff, by the motion to strike out last referred to, and by a motion for nonsuit made by defendant at the close of plaintiff's case, and which was by the court denied.

It is contended by appellant that the testimony of plaintiff, if true, tended to prove a parol promise to answer for the debt of another (the consignor), and was therefore void under subdivision 2 of section 1624 of the Civil Code.

But we think that the facts of this case bring it within one of the exceptions to the general rule. The pertinent part of

section 1624 is as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: . . . 2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794 of this code."

Turning to section 2794 (Civ. Code) we find the following provision: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: . . . 3. Where the promise, being for an antecedent obligation of another, is made . . . upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

The facts of this case are squarely within the above exception. At the time of the promise plaintiff, as carrier, had possession of the cargo of coal, and had a lien thereon for the freight dependent on such possession. Defendant claimed to be the owner of the coal, as purchaser from the consignor, but he could not under the law obtain possession thereof without the consent of plaintiff, except by paying the freight. According to his own letter put in evidence on cross-examination of plaintiff, defendant had already paid the consignors for the coal. Under such circumstances the obtaining possession of the coal discharged of the lien for freight money was a consideration beneficial to defendant, and brought his promise to pay the freight money within the exception of section 2794. It became an original obligation of the promisor.

Counsel for defendant has cited us to *Mauls v. Bucknell*, 50 Pa. St. 39, an interesting case because of the discussion of the diverse rulings of different courts on the proper effect of the statute of frauds. It is there said: "A new consideration for a new promise is indispensable without the statute, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another the statute amounts to nothing, nor can it make any difference that the new consideration moves from the promisee to the promisor." But an examination of the statute of Pennsylvania discloses the fact that, like the statutes of many of our states, it contains no exception such as we have in section 2794 of the

Civil Code. It simply provides that no action shall be brought to charge the defendant upon any special promise to answer for the debt of another unless the promise be in writing subscribed by the defendant. (Pennsylvania Statute of Frauds and Perjuries, sec. 1, Brightley's Purdon's Digest, 831.)

The case, however, recognizes an exception to the general rule within which the case now before the court also comes. Speaking of cases that are exceptions to the general rule, the court said: "*Arnold v. Stedman*, 45 Pa. St. 186, was a case within one of the recognized exceptions. There the promisor's property was liable for the debt of another, independent of the express promise, and the defendant undertook to pay the debt of the property." (The italics are ours.)

In *Arnold v. Stedman*, 45 Pa. St. 186, Arnold, by a written contract, agreed to sell one Barrett two lots of land on deferred payments, and on failure to make the payments Barrett was "to give possession of said property to said Arnold." Barrett took possession, and whilst he was in possession Stedman built a barn on the lots for Barrett and filed a mechanic's claim of lien for two hundred dollars. Barrett not having made his payments to Arnold, the latter brought suit in ejectment, and during the pendency thereof promised Stedman that if he would not proceed further in the action to enforce his lien, he (Arnold) would pay Stedman's claim, and to this Stedman agreed. Arnold having recovered the lots, Stedman brought suit against Arnold on his promise, and the court held that the promise was not within the statute of frauds. The court said: "Here, then, was a lien or claim upon property in which Arnold had an interest, and it was a benefit to him that no proceedings should take place on the mechanic's lien held by Stedman while his ejectment was in progress. The consideration, therefore, as regarded Arnold, of his promise, was the benefit or advantage to himself arising from Stedman's relinquishing proceedings upon his mechanic's lien. The consideration did not proceed from or to the debtor, but was an entirely new and fresh one between Arnold and Stedman, and was a new, original, and binding contract, Arnold's object being, not to answer for the debt of Barrett, but to subserve a purpose of his own."

So in the case before us the cargo of coal, which was the property of defendant, was in the possession of plaintiff, and liable to him for the freight. Defendant's promise to pay the freight in consideration of the delivery of the coal cannot properly be said to be a promise to pay the debt of the consignor, but was a new binding contract between plaintiff and defendant.

Clay v. Walton, 9 Cal. 329, also cited by defendant, was decided at a time when our statute of frauds did not contain the exception contained in section 2794 of the Civil Code (Hittell's General Laws, sec. 3156), and was not a case where plaintiff delivered to defendant property of defendant upon which plaintiff had a lien, and which lien defendant promised to pay, and is therefore not in point.

Judgment and order denying motion for a new trial are affirmed.

Cooper, J., and Harrison, P. J., concurred

[Crim. No. 7. First Appellate District.—September 15, 1905.]

THE PEOPLE, Respondent, v. EDWARD RICHARDS,
Appellant.

CRIMINAL LAW—MURDER—EVIDENCE—DEGRADING QUESTIONS—HARMLESS CROSS-EXAMINATION.—Where a witness for the defendant charged with murder had testified on his examination in chief that he was in the habit of sitting around the saloon where the homicide occurred a great deal of the time, and that he had been arrested on a charge of vagrancy as being an idle and dissolute person, the case will not be reversed because of harmless error in permitting the prosecution on cross-examination to ask questions in regard to the same matters that did not tend more strongly to discredit or degrade the witness than the facts he had already testified to on direct examination.

1D.—TESTIMONY AT CORONER'S INQUEST—ANSWER TO QUESTION—CONTENTION WITHOUT MERIT.—Where such witness was cross-examined on an answer given by him at the coroner's inquest, and upon objection that the whole answer should be read, the court informed the district attorney that he could use as much of it as he desired, a contention that error was committed is without merit where the district attorney read the whole answer and asked questions thereupon.

- ID.—COMPROMISE VERDICT FOR MANSLAUGHTER—INADMISSIBLE AFFIDAVITS OF JURORS.**—The affidavits of jurors are not admissible to impeach their verdict, except when there is a resort to chance, and it was not error to strike out affidavits of jurors that they had voted "Not guilty" and had agreed upon a verdict of manslaughter as matter of compromise with other jurors who had voted for different degrees of murder.
- ID.—INSTRUCTION—DUTY OF JURORS.**—It was not error to instruct the jury that "it is the duty of every juror to reason with his fellow-jurors to the end that he may join in a lawful verdict." The instruction only states that which each juror is presumed to have known. The law requires that the jury retire for deliberation, which means careful consideration of the reasons for and against a choice or measure.
- ID.—SELF-DEFENSE—INSTRUCTIONS—BURDEN OF PROOF—REASONABLE DOUBT.**—When the defendant admitted the killing and claimed self-defense, it was proper for the court to read as part of its charge section 1105 of the Penal Code, that "the commission of the homicide by the defendant being proved, the burden of proving circumstances in mitigation or that justify or excuse it devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable," the court having also instructed the jury that the law does not require the defendant to establish his defense, even by a preponderance of evidence, but that if the evidence was such as to create in the minds of the jurors a reasonable doubt as to the guilt of the defendant, they should acquit him.
- ID.—CHALLENGE TO PANEL—POWER OF SUPERIOR JUDGES—CONSTITUTIONALITY OF CODE PROVISION.**—A ground of challenge to the panel that section 204 of the Code of Civil Procedure in so far as it empowers superior judges to draw jurors in counties having over one hundred thousand inhabitants, and requiring the supervisors to draw them in other counties, is unconstitutional is not tenable. That section is constitutional and valid.
- ID.—CONSTITUTIONAL LAW.**—In cases of reasonable doubt the courts will not hold an act void because unconstitutional, and practice and acquiescence in the machinery provided for by the section in question as to the selection of juries, for so many years, sanctioned by the courts, furnish an almost irresistible reason for not overturning it.
- ID.—UNTENABLE GROUNDS FOR CHALLENGE.**—The work delegated to the secretary of the judges, and the qualifications of jurors on the list, are not grounds for challenge to the panel.
- ID.—DIRECTORY STATUTE—PANEL DRAWN FROM LIST OF PREVIOUS YEAR—ERROR NOT SHOWN.**—The provisions of the code as to the selection of jurors in January of each year are directory and are to receive a liberal construction, where the code provides that after a list of jurors has been made and returned they shall serve

for the "ensuing year," or until a new list shall be provided. No error appears in a panel drawn from the list of the previous year, in the absence of any showing that a new list for the current year had been certified and filed with the clerk.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Milton Shepardson, and R. Clark, for Appellant.

H. V. Morehouse, and forty-nine other attorneys, *Amici Curiae*, for Appellant as to unconstitutionality of section 204 of the Code of Civil Procedure.

U. S. Webb, Attorney-General, and C. N. Post, Assistant Attorney-General, for Respondent.

COOPER, J.—The defendant was charged with the crime of murder and convicted of manslaughter. He made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying said motion.

1. It is contended that it was error for the court to permit the prosecution to ask the witness Selvaggio several questions in cross-examination tending to show that he spent most of his time in lounging and loafing in and around saloons and dance-halls.

The witness had testified on direct examination that he was in the habit of sitting around the saloon where the homicide occurred a great deal of the time; that he had been arrested upon a charge of vagrancy, as being an idle and dissolute person roaming around the streets. The cross-examination did not bring out any facts that would more strongly tend to discredit the witness than the facts he had already testified to on direct examination. It is always the safer and more dignified course for the prosecution to refrain from asking questions in cross-examination that are insulting or that tend merely to degrade the witness. But a case will not be reversed because of error in allowing such questions where it is apparent that no injury was done. In this case the witness had, in direct examination, testified to substantially the

same matters that were brought out in cross-examination, and therefore he suffered no injury by the cross-examination.

2. The court did not err in striking out the affidavits of certain jurors, made for the purpose of impeaching the verdict to which they had assented.

The affidavits tended to show that, after the jurors had been deliberating for more than four hours,—some voting for murder in the first degree, some for murder in the second degree, some for manslaughter, and some for acquittal,—as the hour was getting late, and to prevent being kept out all night, it was agreed as a compromise that the jurors who had been voting for murder would vote for manslaughter, in consideration that those who had been voting for not guilty would also vote for manslaughter. The affidavit of one juror states: "That in order that another trial of said cause be not had, and to save the defendant from being convicted of murder, and purely as a compromise verdict upon said charge, the twelve jurors being unable to agree upon a verdict, affiant, and others upon said jury who believed in the innocence of the defendant upon the charge of murder, agreed to vote and did vote to convict the defendant of the crime of manslaughter."

The verdict was evidently a compromise, as many verdicts are. The jurors held different views, but finally, by mutual concessions, reached a mean between two extremes. The jurors who had voted "Not guilty," in order to save another trial and to prevent defendant from being convicted of murder, agreed to the verdict of manslaughter. The jurors who believed the defendant guilty of murder, in the language of one of the affidavits, "seeing after several ballots were taken that it was hopeless to further vote for the conviction of defendant of murder in the second degree in said cause, voted for the conviction of defendant upon the charge of manslaughter."

If a verdict could be set aside because arrived at after discussion and by way of compromise, few verdicts would stand. A juror who would not deliberate and listen to the views of his fellow-jurors would be a dangerous man to have upon a jury. While every juror should act conscientiously, and not sign or agree to a verdict that he does not approve of, yet discussion and listening to the views of others may convince

him that his first impressions were wrong and that the views of his fellow-jurors are correct. It has been universally held in this state that affidavits of jurors cannot be used to impeach their own verdict, except where the verdict is reached by a resort to the determination of chance.

The case of *Dixon v. Pluns*, 98 Cal. 384, [25 Am. St. Rep. 180, 33 Pac. 268], does not support appellant's contention. There, in an action for damages, the jurors agreed that each juror should write on a piece of paper the amount at which he would fix the verdict, and the aggregate of the sums thus written should be divided by twelve, and that this should be the verdict of the jury. Such verdict was clearly the result of chance. The result was uncertain and unknown, and depended to a certain degree upon the estimate of each juror, which could only be known to himself. In the case at bar each juror knew the verdict to which he agreed. No matter what influences caused him to agree to it, it was assented to by him, and was not determined by chance. If the verdict had been determined in pursuance of an agreement to abide by the result of a game of cards, a guess, or the tossing up of a coin, then affidavits of the jurors finding it would have been admissible.

3. In cross-examination of the witness Salvaggio the district attorney read to him what purported to be his answer to a question from his testimony given at the coroner's inquest, for the purpose of asking the witness if he so stated. The attorney for defendant objected to reading a part of the answer so given, and asked that the whole of the statement be read. The court informed the district attorney that he could read the portion to which he desired to call the attention of the witness. The defendant's attorney excepted to the ruling, and now urges the ruling as erroneous. Notwithstanding the ruling of the court the district attorney said: "I will give everything; I will read from the beginning." He then appears to have continued reading the balance of the answer, covering some two folios of the transcript, and questioned the witness about it. The objection was not renewed, and evidently the whole of the answer given at the coroner's inquest was read; at least it is not shown otherwise. It therefore not only appears that there was no error committed, but that the contention is entirely without merit. It

is due to the business of this court and the orderly dispatch thereof that counsel should not insist upon error in regard to matters of such trifling import.

4. It is claimed the court erred in instructing the jury that "it is the duty of every juror to reason with his fellow-jurors to the end that he may join in a lawful verdict." The instruction only stated to the jury that which each juror is presumed to have known. The court, in the same instruction of which the above is an extract, told the jury: "The action of the other jurors in their deliberation should not influence your action as to what your verdict should be without your judgment individually as a juror in the case is changed by argument of your associates upon the evidence introduced and the law as given you by the court. You are just as much entitled to your opinion as to what the evidence and the law warrants you in doing in this case as is any other juror in the case, or all the others combined."

If the contention of defendant is correct, the jurors would not be required to reason with each other in their deliberations. The law requires that the jury retire for deliberation. (Pen. Code, secs. 1135-1138.) Deliberation means careful consideration and examination of the reasons for and against a choice or measure. We often speak of the deliberations of a legislative body, of a board or council, as well as of a jury. It was the duty of every juror to deliberate, to reflect upon, and reason, for the purpose of joining in a lawful verdict.

5. It is claimed that the court erred in reading section 1105 of the Penal Code to the jury as part of its instructions. The section reads: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable." It is said that the killing was admitted by defendant, and he justified by attempting to show that it was done in self-defense, hence that it was error to tell the jury that in such case the burden of proof shifts to the defendant. The section clearly contemplates that in case the homicide is proved or admitted the burden is upon the defendant

to prove circumstances of mitigation, or that justify or excuse it, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable. And this is what the court told the jury, and was correct. (*People v. Hawes*, 98 Cal. 653, [33 Pac. 791]; *People v. Adams*, 137 Cal. 582, [70 Pac. 662]; *People v. Matthai*, 135 Cal. 445, [67 Pac. 694].) The court elsewhere in its charge told the jury that the law does not require the defendant to establish his defense beyond a reasonable doubt, or even by a preponderance of evidence; but that if the evidence was such as to create in the minds of the jurors a reasonable doubt as to the guilt of the defendant they should acquit him.

Other instructions and rulings are complained of; but after examination we find no prejudicial error, and it would serve no useful purpose to further discuss them.

6. Defendant's counsel have devoted over forty pages of their printed brief to a discussion and criticism of the manner of drawing the jury, and an additional brief *amici curiae* has been filed, with the names of some fifty members of the bar attached to it. We do not deem it necessary to discuss any of the points made in the brief, except the single one raised by the record in regard to the challenge to the panel.

The challenge interposed to the panel was on "the ground that no jury had been drawn, nor had any panel of jurors ever been summoned or drawn for that purpose, defendant claiming that said section 204 of the Code of Civil Procedure, in so far as it purports to confer power on said judges to draw or cause to be drawn a jury to try the defendant, is in conflict with the constitution of this state."

The section referred to provides a general rule to the effect that after the superior court in January of each year has made an order designating the number of trial jurors that will be required for the transaction of the business of the court and the trial of causes for the ensuing year, the board of supervisors shall select in the manner prescribed in sections 205 and 206 a list of persons, equal in number to that designated by the court in its order, to serve as trial jurors during the ensuing year, or until a new list of jurors

shall be provided. Then follows the provision claimed to be unconstitutional, to wit: "In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior courts." If we were considering alone the merits of the methods of selecting trial jurors, we would have no hesitation in saying that the superior judges are certainly as competent to select the list of trial jurors as the boards of supervisors. In either case the list must be made from persons who are assessed on the last preceding assessment-roll, from those who are not exempt from serving, in possession of their mental faculties, not infirm or decrepit, of fair character and approved integrity, and of sound judgment. Then if any juror shall be selected or listed who is not competent, or does not possess the necessary qualifications, he may be challenged for cause. (Code Civ. Proc., secs. 601, 602; Pen. Code, secs. 1071, 1072.)

A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or the intentional omission of the sheriff to summon one or more of the jurors drawn; and must plainly and distinctly state the facts constituting the grounds of challenge. (Pen. Code, secs. 1059, 1060.)

The challenge, being placed upon the ground that the portion of the section quoted (Code Civ. Proc., sec. 204), in so far as it purports to confer power upon the superior judges to draw a jury, is unconstitutional, we can consider no other. The questions as to the work delegated to the secretary by the judges and as to the qualifications of the jurors on the list may therefore be eliminated. In fact such matters are not the ground of a challenge to the panel. The fact that some of the jurors selected do not possess the requisite qualifications is not a ground of challenge to the panel, even if such ground had been stated in the challenge. (*People v. Young*, 108 Cal. 12, [41 Pac. 281]; *People v. Durrant*, 116 Cal. 194, [48 Pac. 75].) It is claimed that the said portion of section 204 of the Code of Civil Procedure, making it the duty of the superior judges, in counties having a population of one hundred thousand or over, to select trial jurors, contravenes section 25 of article IV of the constitution, which

prohibits the legislature from passing local or special laws; " . . . Third—Regulating the practice of courts of justice. . . . Thirty-third—In all other cases where a general law can be made applicable."

In determining the question as to the constitutionality of an act of the legislature we must remember that the legislature is an independent part of our government. It is presumed to have had the constitution in mind when passing the act. It is the exponent of the popular will, and its acts must be treated with respect, reconciled and sustained if possible. A court is never justified in setting at naught the will of the legislature unless it is clearly repugnant to the constitution. In all cases of reasonable doubt the courts will not hold an act to be void because of its being unconstitutional. (*Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 160; *University of California v. Bernard*, 57 Cal. 612.)

Section 204 of the Code of Civil Procedure was amended in May, 1876, so as to authorize the district judges of the several districts in the city and county of San Francisco, probate judge, and judge of the municipal criminal court, or a majority of such judges, to select the list of trial jurors. The section was a part of the judicial system before the adoption of the present constitution, which provides (art. XXII, sec. 11): "All laws relating to the present judicial system of the state shall be applicable to the judicial system created by this constitution until changed by legislation." It has been held that the provision of the section has virtually remained unchanged by legislation, and has been kept in force by the express provisions of the present constitution. (*People v. Gallagher*, 55 Cal. 462; *People v. Durrant*, 116 Cal. 194, [48 Pac. 75].) As this construction has been placed upon the section by the highest court in the state, and as the procedure of selecting the list of jurors by the judges in cities and counties having a population of one hundred thousand or over has been followed in this state for over a quarter of a century, we would hesitate long before holding the section unconstitutional at this late day.

Practice and acquiescence in the machinery provided for by the section as to selecting jurors for a period of so many years, sanctioned by the courts, furnish an almost irresistible

reason for not now overturning it. (*Stuart v. Laird*, 1 Cranch, 299; *Railroad Commissioners v. Market-Street Ry. Co.*, 132 Cal. 677, [64 Pac. 1065].) It has been held that the justices' courts of the city and county of San Francisco provided for by the act of 1866 were continued in force by virtue of the quoted section of the constitution (*Kahn v. Sutro*, 114 Cal. 316, [46 Pac. 87]); and the law regulating appeals from justices' courts to the county courts was held to apply to the superior courts. (*California Fruit etc. Co. v. Superior Court*, 60 Cal. 305.)

The contention is made that the jury was not drawn from the jurors selected and listed for the year 1904.

The statute provides that an order shall be made in January of each year designating the number of trial jurors that will, in the opinion of the court, be required for the transaction of business during the ensuing year, and such jurors shall "serve as trial jurors during the ensuing year, or until a new list of jurors shall be provided."

It is undoubtedly the proper construction of the section, that in any year after the list of jurors for such year has been ordered selected and returned, all jurors thereafter impaneled shall be selected from such list. It is shown by the bill of exceptions that "No name on the present panel of this department of the court has been drawn from the trial jury-box of the year 1904. They were drawn from the jurors selected and listed by the judges and put in the trial jury-box for the year 1903."

The code provides that after a list of jurors has been made and returned, they shall serve for the "ensuing year, or until a new list shall be provided." It does not appear that the list for 1904 had been certified and filed with the clerk and the names placed in the trial jury-box, as it is provided shall be done (Code Civ. Proc., secs. 208, 209), at the time the panel was returned from which the jury was drawn. A new list of jurors was not provided for the year 1904 within the meaning of the law, until the certified list was placed in the possession of and filed with the clerk. It is incumbent upon the party claiming error to show it, as all presumptions here are in favor of the lower court. We must hold the provisions of the code as to selecting jurors directory, and give them a liberal construction. A substantial compliance with

the methods laid down by the statute is all that is required.

The judgment and order are affirmed.

Hall, J., and Harrison, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on October 12, 1905, and a petition to have the cause heard by the supreme court after judgment in the district court of appeal, was denied by the supreme court on November 14, 1905.

[No. 53. First Appellate District.—September 15, 1905.]

GEORGE H. HOUGHTON, and OLIVE M. HOUGHTON,
Respondents, v. MARKET-STREET RAILWAY COM-
PANY, and SAN FRANCISCO AND PACIFIC GLASS
WORKS, Appellants.

NEGLIGENCE—COLLISION OF STREET-RAILWAY CAR WITH TRUCK—INJURY TO PASSENGER—PRESUMPTION.—In an action against a street-railway company and another company owning a truck, for alleged negligence of each in causing a collision by which plaintiff, a passenger on the street-car, was injured, there is a presumption of negligence against the defendant railway company from the fact of the collision.

ID.—ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE AS TO NEGLIGENCE.—Where the defendants had a verdict, and a new trial was granted for insufficiency of the evidence to sustain the verdict, the order will not be disturbed upon appeal where the evidence was conflicting as to whether or not the injury was due to the negligence of both defendants, and there was sufficient evidence to have sustained a verdict for plaintiff, if the jury had so found.

ID.—REVIEW OF GROUNDS FOR ORDER—DENIAL OF CHALLENGE OF JURORS FOR CAUSE—DISQUALIFICATION.—This court is not limited to the particular ground on which the court below granted a new trial, but may review the case and sustain the order on any ground assigned. Where one of the grounds assigned was error in denying plaintiffs' challenge for cause interposed to jurors, and it appears that they were disqualified as not having been on the last assessment-roll, the error in denying the challenge is ground for supporting the order.

Id.—“LAST ASSESSMENT-ROLL”—COMPLETED ROLL.—The “last assessment-roll,” within the meaning of the statute, is the last one completed. The assessment-roll is not completed until certified by the assessor and delivered to the clerk of the board of supervisors. The fact that the jurors challenged had paid to the assessor taxes on personal property assessed for the current year, the assessment-roll including which was not completed at the time of the trial, is immaterial, where their names do not appear upon the last completed roll for the previous year.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

A. A. Moore, and Stanley Moore, for Market-Street Railway Company, Appellant.

M. S. Eisner, for San Francisco and Pacific Glass Works, Appellant.

Sullivan & Sullivan, for Respondents.

CHIPMAN, J.—The plaintiffs, husband and wife, brought this action to recover damages for personal injuries, sustained by the wife through the alleged joint negligence of the defendants, while she was riding as a passenger on defendant railway company’s car. The trial was before a jury and defendants had the verdict. Plaintiffs moved for a new trial upon several grounds, of which the following are urged: 1. Insufficiency of the evidence to sustain the verdict; 2. Error in denying plaintiffs’ challenge for cause interposed to jurors; and 3. Newly discovered evidence.

The court granted plaintiffs’ motion on the ground of insufficiency of the evidence to sustain the verdict. Defendants appeal and contend that the court abused its discretion in granting the motion.

1. It is well settled that the appellate court is not limited to the ground on which the trial court has based its order, but may review the case and sustain the order upon any other assigned ground. (*Churchill v. Flournoy*, 127 Cal. 362, [59 Pac. 791].) The rule is, as conceded by appellants, that this court will not disturb the action of the trial court in grant-

ing a motion for a new trial, unless the evidence is free from substantial conflict and the record shows that the trial court abused its discretion in making the order. Appellants rightly state the question to be whether or not the evidence, viewed in the light most favorable to the plaintiffs, would have justified a verdict against the defendants.

2. Appellants, however, contend for a rule which we think is not sustained by authority or reason,—namely, that no presumption of negligence arose against either defendant; citing *Harrison v. Sutter-Street Railway Co.*, 134 Cal. 549, [66 Pac. 787]. That case went no further than to decide that no presumption of negligence arose against *both* defendants, it appearing that the injury occurred to a passenger on the railway company's car in a collision with the defendant brewing company's wagon. That a presumption of negligence arose as against the defendant railway company in the present case, see *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, [92 Am. St. Rep. 171, 70 Pac. 169]. See, also, *Sullivan v. Market-Street Ry. Co.*, 136 Cal. 479, [69 Pac. 143].

3. Plaintiff Mrs. Houghton in the afternoon of August 21, 1900, was a passenger on defendant railway company's car which was running along Haight Street easterly in the city of San Francisco; she occupied a seat near the first stanchion on the southerly or right-hand side of the dummy or open portion of the car; between her and the front of the car on her left was another passenger, and on her right were passengers sitting on the same seat; the car stopped on the east side of Webster Street, and while there defendant Pacific Glass Works' truck, drawn by two horses, passed the car on its southerly side, going in the same direction; the car started forward and shortly attained its ordinary speed of eight miles an hour, overtook the Glass Works' truck, and, without slackening its speed, passed the hub of the hind wheel safely, but the front stanchion collided with the hub of the front wheel of the truck and caught Mrs. Houghton's foot between the stanchion and wheel, thus causing the injury complained of; the collision occurred between Webster and Buchanan streets, and about one hundred or one hundred and twenty-five feet from Webster Street. Defendants' theory of the case is, that

the injury was the result of inevitable accident; that the truck was moving along parallel with the track at a safe distance from it; that the driver of the truck looked back and saw the car coming, and hence it was immaterial whether the gripman rang the bell or not; that as the car came alongside of the truck the horses gave a sudden lurch to the left, towards the car, and thus brought the hub of the front wheel in collision with the car stanchion and caused the injury; that the driver was in perfect control of the team, but its movement to the left was so sudden and unexpected that he could not check it in time to avoid the accident. There was some evidence tending to establish this theory. This evidence, however, was in conflict with evidence tending to establish an entirely different explanation of the accident, an explanation which, we think, would have warranted the inference by the jury that the accident was the result of the negligence of both defendants.

The width of the truck between the outer edges of the front wheels was six feet four and one quarter inches, and the distance between the outer edge of the southerly track rail and the Haight-Street curb was eleven feet four and one half inches. The lower step of the car extended nineteen inches beyond the rail in a southerly direction; from the outer edge of the seat on which Mrs. Houghton sat to the outer edge of the stanchion the distance was ten inches, and fastened to the stanchion was a grab-rail projecting three and one half inches further. The clear distance from the stanchion to the curb was ten feet two and one quarter inches. The width of the truck at the edge of the front wheels being six feet four and one quarter inches, left the driver three feet eight inches clear space between where Mrs. Houghton's feet were resting and the truck, if he had availed himself of it. Mrs. Houghton testified: "I saw the hind wheel of the truck first. The hind wheel of the truck came very close to the lower edge of the lower platform of the car; it almost touched. I remember that it almost touched my foot. After passing the rear wheel of the truck my foot was caught in the front, between the stanchion and the front wheel. I don't remember much that happened after that." There was evidence that the gripman did not slacken his speed until he had passed the hind wheel of the truck, and, as some of the witnesses testified, almost simultaneously with the collision. There was

evidence also that the gripman did not ring his bell until about the instant of the collision. With a clear view of the truck and its proximity to the track it was a question of fact whether the gripman was guilty of negligence in running his car at full speed alongside of this truck, and also whether he did so without warning to its driver. We think there was unmistakably a conflict in the evidence as to whether the railway company was guilty of negligence. The driver of the truck knew that the car was behind and must soon overtake him, for he had just passed it going in the same direction; as to whether he looked back and saw the car coming the evidence was in conflict. If the gripman had sounded a timely warning the truck-driver might have pulled away from the approaching car, but it was a question in the case whether, knowing that the car would soon be up with him, he was guilty of negligence in driving so close to the track when there was ample room to have avoided doing so. Furthermore, there was evidence admitted as against the Glass Works defendant tending to show that the driver of the truck turned his horses as if to cross the track to pass a laundry wagon that was standing ahead of him and on the same side of the street.

The theory of inevitable accident rested principally on the testimony of the driver of the truck, who testified as to the lurching of his horses towards the car. As against the Glass Works defendant a witness testified to admissions made by the truck-driver which were inconsistent with the truth of his statement that the collision was caused by the sudden movement of his team towards the car which he could not control.

Without noticing the evidence further, we think it was not without substantial conflict on the question of negligence as to both defendants and that there was sufficient evidence to have sustained a verdict for plaintiffs had the jury so found.

4. The trial occurred in May, 1901. Two of the jurors, as appeared from examination upon their *voir dire*, were not on the assessment-roll for 1900, but had paid personal property tax on property which they owned on the first Monday of March, 1901. Both jurors were challenged for cause by plaintiffs on the ground that they were not on the last assessment-roll. The court overruled the challenges and plaintiffs ex-

cepted. It appeared that plaintiffs were obliged to and did exercise all the peremptory challenges allowed them by law. If the challenges interposed to these two jurors had been allowed, other jurors who sat upon the jury might have been peremptorily challenged by plaintiffs. (*Lombardi v. California-Street R. R. Co.*, 124 Cal. 311, [57 Pac. 66].)

Section 198 of the Code of Civil Procedure provides: "A person is competent to act as juror if he be: . . . 4. Assessed on the last assessment-roll of the county, or city and county, on property belonging to him." Section 199 of the Code of Civil Procedure provides: "A person is not competent to act as a juror: 1. Who does not possess the qualifications prescribed by the preceding section"; and a proposed juror lacking the prescribed qualifications may be challenged. (Code Civ. Proc., sec. 602.) The question then is: Were these jurors on the last assessment-roll within the meaning of the statute? Property in possession or under control of a person on the first Monday in March at twelve o'clock noon is subject to assessment. (Pol. Code, sec. 3629.) The assessor must complete his assessment-book "on or before the first Monday in July." (Pol. Code, sec. 3652.) Under this section the assessor may complete the assessment-roll before the first Monday in July of each year; but it is not claimed that he had done so in this instance; on the contrary, we understand the fact to be that the assessment-roll was not completed. All that had happened, so far as concerned these jurors, was that the assessor had collected from them tax on personal property that might appear on the assessment-roll for the year 1901, when completed. As the trial took place in May, 1901, the last assessment-roll which was then in existence was that for the year 1900. This view would seem to be confirmed by an examination of sections 204 and 205 of the Code of Civil Procedure. It is there provided that jurors shall be selected in the month of January of each year, and shall serve during the ensuing year, and that persons thus selected shall be those "who are assessed on the last preceding assessment-roll of such county or city and county." In January, 1901, the only assessment-roll in existence was that for the year 1900, and the challenged jurors were not on that roll, nor was property at that time assessable for the year 1901. Reading all these sections together,

as may be done, we think the assessment-roll contemplated by the statute was that for the year 1900.

If the assessment-roll for any given year has been completed and a juror is found to be on that roll as a taxpayer when called to sit in a case he might with some reason be said to be on the last assessment-roll. Upon the point, however, we express no opinion, as such a case is not before us. But here there was no last assessment-roll, and no completed roll at all except that for the year 1900. How can we say, as is contended by appellants, that the assessment-roll for 1901 was in contemplation of law completed when we know the fact to be that it was not then completed? It was held in *Allen v. McKay*, 139 Cal. 94, [72 Pac. 713], that the tax-list or assessment-roll, which must be certified by the assessor and delivered to the clerk of the board of supervisors, is the only record of his final judgment in respect to the valuation of property. He has no other official record of assessments, and until this record is finally made up, completed, and certified as required by the statute (Pol. Code, sec. 3652), it is entirely within the assessor's control, and may be altered or changed to conform to the facts; until then it cannot be said that the last assessment-roll mentioned in the statute is in existence.

The right of trial by jury is a constitutional right given to litigants in which the persons called to the jury-box have no concern and in which no right of theirs is involved. While the right of trial by jury, as contemplated in the constitution, may not be taken away by the legislature, it is within its power to prescribe the qualifications of jurors. Litigants are entitled to have remain in the jury-box such persons only, if due and timely objection be made, as the statute declares are qualified to sit as jurors. The challenge was for good cause (*People v. Thompson*, 34 Cal. 671; code provisions, *supra*); and plaintiffs could rely upon the error in denying their challenge. (*Lombardi v. California-Street R. R. Co.*, 124 Cal. 311, [57 Pac. 66].)

The order is affirmed.

Harrison, P. J., and Cooper, J., concurred.

[No. 56. First Appellate District.—September 15, 1905.]

ALVARETTA L. MARCH, Administratrix of William F. March, Deceased, Appellant, v. S. BARNET, JACOB STEEN, ISAAC BLUM, JOSEPH BLUM, and I. H. JACOBS, Respondents.

ACTION FOR CONVERSION—JUDGMENT FOR DAMAGES—LESSER LIABILITY OF ONE DEFENDANT—PAYMENT—CREDIT UPON JUDGMENT—SATISFACTION.—In an action for damages for the wrongful conversion of plaintiff's property by sale thereof under execution, found to be of the value of one thousand dollars at the time of the taking, for which sum, with interest, judgment was rendered against three defendants, while as to a fourth defendant the judgment was limited to a less sum, in which the proceeds of sale had been applied to his use, after payment by him of such less sum, the other defendants are entitled to credit therefor upon the judgment against them, and upon payment of the residue of one thousand dollars, with interest and costs of suit, are entitled to a satisfaction of the judgment.

1D.—BENEFIT OF EXECUTION SALE.—The plaintiff by accepting such less sum from one of the defendants has availed himself to that extent of the benefit of the execution sale, and is only entitled to the residue to the extent to which he has been injured thereby.

APPEAL from an order of the Superior Court of Santa Cruz County recalling and quashing an execution and ordering entry of satisfaction of judgment. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

W. D. Storey, for Appellant.

Dinkelspiel & Jacobs, and Lindsay & Netherton, for I. H. Jacobs, Respondent.

HALL, J.—This is an appeal by plaintiff from an order of the trial court quashing and recalling an execution and ordering the entry of satisfaction of the judgment that had been rendered in favor of plaintiff.

This action was brought by William F. March, and on his death Alvaretta L. March, as administratrix of his estate, was substituted as plaintiff.

In the complaint it is alleged in substance that theretofore an action had been brought by one Button against said Jacob Steen, as maker of a certain promissory note and said William F. March as indorser thereof; that an attachment had been issued and property of Steen levied upon; that to secure the release of said property said S. Barnet and one Bowman entered into an undertaking whereby they undertook to pay any judgment that might be rendered against Steen, and thereupon the attachment was released. Subsequently in said action judgment was recovered against Steen, as maker, and March, as indorser, for the sum of \$625.97. Thereupon Barnet paid said judgment, and took an assignment thereof from Button. Subsequently Barnet assigned said judgment to Isaac Blum, who shortly after assigned it to Joseph Blum, having first taken out execution and placed the same in the hands of the sheriff, with instructions to seize and sell the interest of March in the schooner Ingalls, which, under the further directions of Joseph Blum, the sheriff did, selling the said interest of March to Joseph Blum for seven hundred and seventy dollars. (Said interest was alleged to be of the value of fourteen hundred dollars, but was found by the court to be of the value of one thousand dollars.) Before making the sale the sheriff demanded an indemnifying bond, which was given by the Blums and I. H. Jacobs. Joseph Blum, on the day of the sale, transferred his purchase to I. H. Jacobs, who at the beginning of the suit still held the same. Of the amount realized on the sale \$596 was credited on the execution, the balance being applied to costs of sale, etc.

Each of the defendants at said sale and at the time of said assignment of said judgment had notice of the relation that Barnet bore to said judgment, and knew that he was a surety on said undertaking for the release of the attachment on Steen's property; that said transfers from Barnet to Isaac Blum, from Isaac Blum to Joseph Blum, and from Joseph Blum to I. H. Jacobs, were made with the purpose on the part of each of the parties thereto to have the said property of plaintiff seized under said execution and sold to reimburse Barnet for the amount he had paid on the judgment against Steen; that Steen instigated and aided and abetted the other defendants in said matters, and that all the other defendants

actively participated therein. Judgment was demanded for fourteen hundred dollars, interest, and costs.

The court found the facts as above set forth, save that it did not find that Steen instigated, aided, or abetted the proceeding, and rendered judgment for plaintiff against Steen for seven hundred and seventy dollars, and interest from the date of said sale and costs, but gave judgment for the other defendants.

The defendant Steen took an appeal from the judgment against him, and the plaintiff appealed from that portion of the judgment in favor of the other defendants.

Upon the hearing of the appeal taken by Steen the judgment was modified by reducing the amount to the sum of \$596, the amount actually credited on the judgment (*March v. Steen*, 114 Cal. 375, [46 Pac. 152]), he being held liable upon the ground that by the sale under execution of property of plaintiff and the application of the proceeds to the payment of a judgment for which, as between plaintiff and Steen, Steen was primarily liable, plaintiff was entitled to recover of Steen the amount which he, plaintiff, had in effect paid on the judgment against Steen.

Steen promptly paid this judgment to one Devoe, the assignee thereof.

Subsequently the appeal of plaintiff as against Barnett, the Blums, and Jacobs was decided, and judgment ordered upon the findings against said last-named defendants for one thousand dollars, the value of the property of plaintiff which it was determined had been wrongly seized and sold by these defendants, and interest from the date of the sale and costs. (*March v. Barnett*, 121 Cal. 419, [66 Am. St. Rep. 44, 53 Pac. 933].) Upon the entry of judgment in the trial court plaintiff caused execution to issue for the full amount thereof, giving no credit for the amount that had previously been paid by Steen, and levied on property of this respondent, I. H. Jacobs.

Jacobs moved the court to recall said execution, and before the hearing of the motion paid to the sheriff the balance due on such judgment, after deducting from the amount of the judgment entered against Barnett, the Blums, and Jacobs the amount theretofore paid by Steen. The court granted the motion, and ordered the entry of full satisfaction of the judgment.

The appellant claims the right to collect the full amount of the judgment entered against the co-defendants of Steen without giving any credit for the amount paid by Steen, while the respondent claims that he is entitled to a credit for the amount paid by his co-defendant Steen.

This latter contention we think to be correct. The action was brought to recover damages resulting to plaintiff from the wrongful taking of his property. It was found that the property taken was of the value of one thousand dollars. As a result of the litigation between these parties, it has finally been adjudicated and determined that plaintiff's property was wrongfully taken and converted to his damage in the sum of one thousand dollars, the value of the property at the time of the conversion, and interest from said time. It has also been determined that Barnet, the two Blums, and Jacobs are jointly and severally liable to plaintiff for the entire amount of such damage, while Steen is liable only to the extent to which the proceeds of the property wrongfully converted were applied to his use. Notwithstanding the form in which the judgment was finally entered,—\$596 against Steen, and one thousand dollars against Barnet, Blum, and Jacobs,—it is plain from the entire record that it is but one judgment for one thousand dollars damages, for which Barnet, the Blums, and Jacobs are liable for the entire amount and Steen for \$596 only. Plaintiff has now been paid the one thousand dollars which the court determined to be the full value of his property wrongfully converted, together with interest from the date of conversion and costs of suit. By collecting from Steen the \$596 realized from the execution sale, he has availed himself to that extent of the benefit of that sale.

The orders are affirmed.

Harrison, P. J., and Cooper, J., concurred.

A petition to have the cause heard by the supreme court after judgment in the district court of appeal, was denied by the supreme court on November 14, 1905.

[No. 42. First Appellate District.—September 15, 1905.]

W. FRESE, Respondent, v. J. J. MOORE, Appellant.

CHARTER OF VESSEL.—CONTRACT FOR LUMBER.—ASSIGNMENT.—A contract to charter a vessel, and by the owners to furnish lumber for freight at a fixed price per thousand, is assignable without the consent of the owners. Although the assignor is not released by the assignment from the burden of the contract, the assignee takes all of the rights from the assignor thereunder.

ID.—CONSIDERATION OF ASSIGNMENT.—OBLIGATION OF ASSIGNEE.—Where the assignee as a recharterer, in consideration of the assignment, agreed to pay a higher than the contract rate to the assignor, he is under an implied obligation to carry out the contract purchased, and to act in good faith with the assignor.

ID.—BREACH OF DUTY BY ASSIGNEE.—RELEASE OF OWNERS.—NEW CHARTER.—Where as the result of the breach of duty by the assignee to comply with the terms of the contract, the owners assumed to cancel it, and the assignee thereafter without the assignor's consent released the owners from the original contract, and took a new and different contract, though such release concludes the assignor, the assignee is directly liable to him for the consideration agreed to be paid, and cannot evade such liability by reason of the release or of the failure of the owners through his fault to carry out the original contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

E. B. Young, for Appellant.

Nathan H. Frank, and S. Bloom, for Respondent.

COOPER, J.—Appeal from judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

The facts upon which the question as to whether or not the defendant is liable are in substance as follows: On November 3, 1897, the plaintiff (as party of the second part) entered into a contract with the Brunette Sawmill Company (as party of the first part), by the terms of which plaintiff chartered from said company the American barkentine

Wrestler for a voyage from Frazer River in British Columbia to Fremantle in Australia. The company agreed to furnish for plaintiff to said vessel at designated loading-place or places a full cargo of sawed lumber at the basis price of seven dollars net for rough merchantable, payable when cargo should be loaded. The charter party or contract contained the following clauses:—

“The said party of the second part agrees to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, in cash without discount, at current rate of exchange on day of settlement, on the right and true delivery of cargo at port of discharge, for each one thousand feet board measure of lumber and/or timber delivered at fifty (50/—) sterling.”

“Vessel to pay a commission at port of loading of (5) five per cent on amount of charter, in U. S. gold coin, at the exchange of \$4.86 per £ sterling to W. Frese & Co., or order, to be consigned to charterer’s agent at port of discharge, (inward only) free of commission at port of discharge.”

“While at Puget Sound or British Columbia, as above, vessel to be consigned to charterer’s agent, outward, and if in ballast also inward, free of commission, but paying them usual fee for doing custom-house business (not to exceed \$25), and also to clear in the name of charterer.”

“To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other in the penal sum of *estimated amount of charter*.”

The above shows not only a charter party, but a contract by the owners of the vessel to furnish a cargo of lumber for the vessel at a specified rate per thousand feet, and by plaintiff to pay not only the freight as per the charter party, but seven dollars per thousand for the cargo of lumber when loaded on the vessel.

On December 4, 1897, without the consent of the company, the plaintiff agreed to recharter to defendant the vessel, and assign the contract and charter party on the following terms: “57/6 to Fremantle, West Australia, other terms as per original charter party, copy herewith, combined with the cargo of lumber, at the basis price of \$7.00 net for rough

merchandise, difference of freight between the above and the original rate of 50/—to be paid to us in cash on completion of loading, less the usual $6\frac{1}{2}\%$ (six and one half per cent)."

On December 9, 1897, the plaintiff wrote to the mill company informing it of the transfer to defendant of the charter party and the cargo, and in the letter stated as the reason for the transfer: "We did so because our constituents, not knowing your mill and the quality of lumber you turn out, instruct us to draw only 80% of the f. o. b. price, leaving 20% guarantee of good delivery. We decline to entertain this proposition."

December 14th the company wrote to plaintiff acknowledging the receipt of his letter and stated to plaintiff, "but cannot consent to the transfer of the charter party. However, as the party who purchased the cargo has refused to comply with the terms, we will release you from the charter party, as the owners of the *Wrestler* contemplate selling her on her arrival here."

On December 21, 1897, the plaintiff again wrote to the company, declining to accept the release from the charter party, and calling attention to the fact that he had sold to the defendant, and in the letter stated, "We of course are responsible to you for the strict fulfillment of contract as signed by us."

December 21, 1897, the defendant wrote to the company informing it of the transfer by plaintiff of the charter party and the right to the cargo of lumber to him, and asking for certain changes as to freight rates and place where the vessel was to land. On the receipt of the above letter, December 23d, the company telegraphed to defendant: "We canceled charter on 14th instant with Frese account purchaser refusing cargo on our terms."

Defendant immediately telegraphed to the company that he held indorsed charter party and had purchased cargo, and that the charter must be carried out. On the following day, December 24th, the company again telegraphed to defendant, stating: "Frese cannot recharter without our consent, which we refuse. Charter canceled."

Defendant then on the same day wrote the company, calling attention to the various correspondence and telegrams, and stated that he had purchased the cargo and the charter

party from plaintiff, and in the letter said: "What you mean by stating that Frese & Company could not recharter the vessel without your consent is a conundrum to us; a charter party can be transferred the same as any other negotiable document, be it promissory note, bill of exchange or anything else, and is an every-day occurrence, and till we received your message we never heard of the right to do so being questioned, and we cannot think that you were serious in believing that such could not be done. . . . Trusting that you will understand your position, and that there will be no more difficulty and annoyance about the transaction, we are," etc.

On the 28th the defendant again wrote to the company inclosing specifications for the cargo, and insisting on the company keeping its contract, and in the letter defendant said: "This morning we are in receipt of your wire as follows: 'Wrestler awaiting your orders to load, we refuse sell cargo on terms made Frese, he having already canceled.' To say that we are surprised at your actions in this matter would be putting it mildly; and that any responsible and respectable institution would try the various ways that you have tried to get out of this contract is astonishing. First it is one thing, and then it is another, one of which is as flimsy as the other; in fact your own telegrams to us would show in a court of justice that you yourselves know that you had no grounds wherewith to cancel the charter party or the lumber contract with Frese & Co."

On January 1, 1898, the lumber company wrote to defendant acknowledging telegrams and letters, and stating that it could not agree with defendant, and continuing: "However, we cannot supply the cargo your specifications call for and wired you as follows: 'Refuse to supply cargo; will charter you 'Wrestler' to Sydney at 38/—. You buy cargo in Vancouver, and give you option for recharter coals from Sydney,' which we think is a very fair offer. Our mill is shut down at present undergoing repairs."

On January 8, 1898, defendant wrote to the company agreeing to charter the Wrestler on certain terms named in the letter, to load at Hastings Mills, Vancouver to Sydney, and in this letter defendant, without consulting plaintiff, stated: "And we agree to release both the 'Wrestler' and the Brunette Saw Mill Company from all our interests in

the charter party entered into with W. Frese & Co., for a voyage to Fremantle, under date November 3d, 1897, as well as our interests in the cargo of lumber which went with the charter party."

Defendant, after releasing the sawmill company from the first charter party and contract, entered into a new charter party with the company by which he shipped to Sydney instead of Fremantle 564,000 feet of lumber, which at the rate of profit per thousand that Frese & Co. would have made, had the defendant held the sawmill company to its contract, would amount to \$961.08, being the amount with interest for which plaintiff recovered judgment.

We are of opinion that plaintiff was entitled to judgment. His charter party and agreement to purchase lumber were property which he had a right to sell upon such terms as he saw fit. Defendant purchased the charter party and right to purchase the cargo of lumber for a consideration which he agreed to pay. The consideration was the difference in the freight rate in the original charter party and the rate named in the recharter. Defendant has not paid plaintiff. He purchased plaintiff's property and must, under the circumstances, pay the amount he agreed to pay.

The charter party and contract did not require any personal skill on the part of plaintiff, was one the covenants of which the defendant could perform as well as plaintiff, and was transferable. (Civ. Code, secs. 1044, 1459; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, [21 Am. St. Rep. 63, 25 Pac. 52].) It was not necessary for the plaintiff to obtain the consent of the company in order to transfer the charter party and contract. Of course, the burden of the obligations could not be transferred without the consent of the company. (Civ. Code, sec. 1457; *Cutting Packing Co. v. Packers' Exchange*, *supra*.) Plaintiff did not attempt to transfer the burden of the obligations, but took the pains to inform the company that he was responsible for the strict fulfillment of contract signed by him.

Defendant, by the assignment of the charter party and contract, assumed its burdens on his part as to plaintiff. Plaintiff was not released by the company, and was still responsible to the company as surety to the effect that the defendant would faithfully carry out the charter party and contract.

There was an implied contract on the part of defendant to plaintiff that he would carry out the plaintiff's contract which he had purchased. (*Cutting Packing Co. v. Packers' Exchange, supra.*)

The indorsement and transfer of the contracts to defendant transferred all of the plaintiff's rights thereunder. (Civ. Code, sec. 1459; *Myers v. South Feather W. Co.*, 10 Cal. 579; *McCarthy v. Tecarte L. etc. Co.*, 110 Cal. 691, [43 Pac. 391]; *Allen v. Randolph*, 4 Johns. Ch. 692.)

It follows that when defendant released the company, the release was conclusive as to plaintiff. Plaintiff could not maintain an action against the company upon obligations which he had transferred and assigned to defendant. His remedy, therefore, was against defendant. After having transferred the obligations to defendant for a valuable consideration, defendant could not relieve himself of the payment of the consideration by releasing the company. Defendant contends that he was not liable to plaintiff for the freight under the recharter and assignment until the cargo was delivered, and, as it was never delivered, and the company refused to deliver it, the event never happened upon which defendant's liability depended. It is a conclusive answer to this contention that defendant, by his own act, released the company from its obligation to deliver the cargo of lumber. Defendant will not be allowed to take advantage of his own wrong. By his own act he prevented the performance of the obligation of the company to deliver the lumber, and the plaintiff is entitled to all the benefits he would have obtained if the contract had been performed by the company. (Civ. Code, sec. 1512.)

If the defendant had not released the company, and if after due diligence on his part he had failed to enforce the contract with the company, a different question would be presented; but after plaintiff sold to defendant the charter party and contract for a consideration the defendant was bound to act in the utmost good faith in the matter.

The judgment and order are affirmed.

Hall, J., and Harrison, P. J., concurred.

[No. 46. First Appellate District.—September 15, 1905.]

**MARIA PELEGRINELLI et al., Appellants, v. McCLOUD
RIVER LUMBER COMPANY, Respondent.**

JUDGMENT BY DEFAULT—VACATION—EXCUSABLE NEGLIGENCE—DISCRETION.

—An order vacating a judgment suffered by default on the ground of the excusable neglect of the defendant is addressed to the discretion of the court, and will not be disturbed where no abuse of discretion appears. The discretion of the court is best exercised when it tends to bring about a judgment on the merits of the controversy between the parties.

Id.—PLAINTIFFS NOT INJURED.—Where a proper affidavit of merits was shown, and an answer tendered with an offer of a speedy trial on the merits, and the plaintiffs made no claim that they would suffer any loss or injury by reason of the setting aside of the default, or that they would be deprived of any right by an early trial of the cause, and the order was made upon terms, the terms must be deemed an ample compensation to them for inconvenience and delay in being put to a second hearing of the case.

AFFIDAVIT UPON INFORMATION AND BELIEF.—Though the code authorizes allegations of a pleader to be made upon information and belief, an affidavit which is to be used as evidence must be positive and direct, and facts purporting to be stated therein upon information and belief are not to be considered.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment by default. John Hunt, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, and Theodore J. Roche, for Appellant.

E. S. Pillsbury, and Pillsbury, Madison & Sutro, for Respondent.

HARRISON, P. J.—Judgment in favor of the plaintiffs was rendered herein upon the default of the defendant for failure to answer the complaint. Upon the motion of the defendant the court made an order setting aside the default and judgment upon the payment by the defendant to the plaintiffs of one hundred and fifty dollars within ten days from the date of the order. From this order the plaintiffs have appealed.

The defendant is a corporation engaged in operating a lumber-mill in Siskiyou County, and the present action is to recover damages sustained by the plaintiffs as the personal representatives of one Amateo Pelegrinelli by reason of his death in May, 1900, alleged to have resulted from the negligence of the defendant. The action was commenced February 6, 1902, and the default of the defendant for want of appearance was entered February 25th, and judgment thereon was rendered March 17, 1902. The motion to set aside the default was noticed March 25th, and on March 28th the court made the above order.

In *Nicoll v. Weldon*, 130 Cal. 666, [63 Pac. 63], it was said: "The granting or denying a motion to set aside the default of the defendant is so largely a matter of discretion with the trial court that unless it is clearly made to appear that there has been an abuse of this discretion this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default and it does not appear that the plaintiff has sustained any prejudice thereby. The discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties." (See, also, *Melde v. Reynolds*, 129 Cal. 308, [61 Pac. 932]; *O'Brien v. Leach*, 139 Cal. 220, [96 Am. St. Rep. 105, 72 Pac. 1004]; *Savings Bank v. Schell*, 142 Cal. 505, [76 Pac. 250].)

Error is never presumed, and the burden of showing an abuse of discretion on the part of the trial court is always upon the appellant. As in the case of a finding of fact by that court, if there was any evidence before it which by reasonable construction will support its order its action will be upheld. If the facts presented to it are such that reasonable minds might reach different conclusions thereon, the appellate court will not disturb the conclusion reached by the trial court. The rule is the same whether the motion is granted or denied by the trial court. An examination of the cases cited by the appellants will show that in all of them the action of the trial court has been affirmed, with the exception of two or three cases, in which the default of the party was clearly attributable to pure neglect on his part and without any showing of an excuse.

The death of Pelegrinelli occurred in May, 1900, and in June of that year the defendant was informed by certain

attorneys of their purpose to institute an action against it in behalf of the present plaintiffs; and thereupon the defendant made preparation for the defense of such action by obtaining statements of those having knowledge of the facts connected with the death, and by procuring photographs of the locality. No action was brought at that time, but on February 6, 1902, other attorneys commenced the present action. At the hearing of the motion to set aside the default it was shown by affidavits presented on behalf of the defendant that at the time the action was commenced and for some time prior thereto the defendant held a policy of insurance with an insurance company, by the terms of which that company agreed to defend it against all actions of the character of the present one. The summons and complaint in this action were not served until February 10th, but on the morning of February 7th the president of the defendant saw a notice in a San Francisco newspaper that the action had been commenced, and he immediately sent for the agent of the insurance company and informed him thereof, and with him went over the case and the matters and facts connected with it and with the defense thereto; and the said agent then and there agreed with the president that the insurance company would appear in said action through its regular attorneys on behalf of the defendant and defend the same, and take entire charge of said defense. At the same time the president delivered to the said agent all of the aforesaid photographs and statements of witnesses. Nothing was said between them with reference to the summons or complaint in the action, or with reference to the service of the same, or when the insurance company would appear therein on behalf of the defendant; but the president states in his affidavit that he understood and believed, from the statement of the agent, that the insurance company would forthwith or within a few days thereafter enter an appearance in the action, or arrange with the attorneys for the plaintiffs with reference thereto, and would take all steps necessary or proper for its defense in said action; and that from that time until after he had learned that judgment had been rendered herein he believed that said company had appeared in the action or arranged for an appearance, and had done or were doing everything neces-

sary or proper for the defense of the company. The summons and complaint were served upon the secretary of the defendant, and were by him immediately delivered to the president, who placed them in a drawer in his office where they remained until after he learned of the entry of the judgment. He also states that he had no notice or knowledge that the defendant's default had been taken, or any trial of the action had, until after the judgment had been entered. The agent of the insurance company, in his affidavit, corroborates the affidavit of the president, except that he states that in the interview of February 7th he meant by his promise and agreement, and thought that the president understood and believed that he meant, that no appearance would be entered in the action or steps taken by the insurance company on behalf of the defendant until after the service of the summons and complaint and notice thereof was given to the insurance company; but he also stated that nothing was said between them with reference thereto.

An affidavit of merits was made on behalf of the defendant, and also an offer to file a verified answer forthwith and proceed at once to the trial of the action, and to comply with any order as to terms that the court might deem reasonable as a condition for setting aside the default and judgment.

It sufficiently appeared from these affidavits that the defendant had been advised and believed that it had a good and substantial defense to the plaintiff's action upon the merits, and that it had made preparations for such defense, and intended to defend the action, and for that purpose had secured the aid of the insurance company. We cannot say that it would have been an unreasonable inference by the trial court from the affidavits that upon the interview between the president of the defendant and the agent of the insurance company he honestly and in good faith understood and believed that that company would, without any further notice or request on his part, take all necessary steps for the defense of the action; and in support of the order appealed from it will be assumed here that that court did make such inference. It may be conceded that it would have been an act of prudence on his part, when he received the copy of the summons and complaint, to have delivered them to the insurance company; but if he had the right to believe and

did believe that the insurance company would enter its appearance and defend the action irrespective of any service of the summons, his failure to give the copies to it cannot be held to have been attributable to any carelessness or inattention. Whatever omission there was must be regarded as an excusable neglect. "Section 473 of the Code of Civil Procedure is a remedial provision, and is to be liberally construed so as to dispose of all cases upon their substantial merits and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it." (*Nicoll v. Weldon*, 130 Cal. 666, [63 Pac. 63].)

The policy of insurance held by the defendant, which was introduced on behalf of the plaintiffs, in which there is a provision requiring the holder of the policy, whenever an action should be brought against it, to forward immediately to the office of the company the summons or other process as soon as the same should be served upon it, cannot be considered in determining whether there was negligence on the part of the defendant, inasmuch as this policy was not issued until after the default had been entered in this action. The affidavit of one of the plaintiffs to the effect that at the time of the accident the defendant held another policy from the same company containing a similar provision, was not entitled to be considered by the court, for the reason that it purported to be only an affidavit that the affiant had been informed and believed that such was the case. The code authorizes allegations of a pleader to be made upon information and belief; but an affidavit which is to be used as evidence must be positive and direct. The action of the court is to be based upon facts which may be presented to it, and not upon the belief of the affiant. (See *Gay v. Torrance*, 145 Cal. 144, [78 Pac. 540]; *Thompson v. Higginbottom*, 18 Kan. 42.)

The plaintiffs made no claim that they would suffer any loss or injury by reason of setting aside the default, nor did it appear that, upon an acceptance of the defendant's offer to have the case set down for trial at an early day, they would not be able to fully present their cause of action, or that they would be deprived of any right. The terms imposed by the court must be deemed an ample compensation

for the inconvenience and delay incident upon being required to try the case again.

The order is affirmed.

Cooper, J., and Hall, J., concurred.

[No. 67. First Appellate District.—September 16, 1906.]

MARY LYNDE CRAIG, SAMUEL LYNDE FOSTER, and
MARION B. FOSTER, Respondents, v. G. F. GRAY,
and H. GRAY, Appellants.

UNLAWFUL DETAINER—TERMINATION OF LEASE—PLEADING—NOTICE NOT
REQUIRED.—In an action for unlawful detainer of real property
wrongfully detained by a lessee after the expiration of the terms
of the lease, without consent of the lessors, the complaint need
not allege either a three days' notice to quit or a thirty days'
notice to terminate the lease.

10.—SUPPORT OF FINDINGS AND JUDGMENT—IMMATERIAL OMISSION TO
FIND.—Where the findings made are sustained by the evidence
and support a judgment rendered in favor of two of the plaintiffs,
the failure to find upon an issue as to the title of a third plaintiff,
in whose favor no title was proved, is immaterial, as the proper find-
ing upon such issue against such title could not change the judg-
ment rendered.

APPEAL from a judgment of the Superior Court of the
City and County of San Francisco and from an order deny-
ing a new trial. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Fisher Ames, for Appellants.

Leonard Stone, and Mary Lynde Craig, for Respondents.

HALL, J.—The plaintiffs Mary Lynde Craig and Samuel
Lynde Foster recovered judgment against defendants for
the possession of certain premises, together with the sum of
fifteen hundred dollars damages, with interest and costs, in
an action of unlawful detainer.

The defendants have appealed from an order denying their motion for a new trial, and from so much of the judgment as awards damages, but not from that portion which awards possession of the premises to plaintiffs.

Appellants urge that "the complaint does not state facts sufficient to constitute a cause of action," and contend that the complaint should contain an allegation of the giving of a notice to quit. But the complaint in this case alleges a holding over without the permission of the landlord or his successor in estate after the expiration of the term fixed in the lease. As alleged in the complaint, by express provisions of said lease, the term thereof expired on the first day of December, 1901. In such a case neither a three days' notice to quit nor a thirty days' notice of the termination of the lease is required. (Code Civ. Proc., sec. 1161, subd. 1. See *Church v. Quan Wo Chung & Co.*, 91 Cal. 583, [28 Pac. 45]; *Canning v. Fibush*, 77 Cal. 196, [19 Pac. 376]; *Stoppkamp v. Mangeot*, 42 Cal. 322; *McKisick v. Ashby*, 98 Cal. 424, [33 Pac. 729]; *Perrine v. Teague*, 66 Cal. 446, [6 Pac. 84].)

The court found that the defendants, after the expiration of the terms fixed in the lease, continued in possession of the premises without permission of the plaintiffs, or either of them; and the appellants urge that the evidence shows that appellants retained possession of the premises with the consent of plaintiffs. In this connection it may be noted that defendants in their answer deny that they remained in possession of the premises at all after the termination of the lease. But passing this point the evidence was sufficient to warrant the court in finding that defendants remained in possession after the termination of their lease *without the permission of the plaintiffs*.

The premises were leased to defendants by Mary L. Craig and Samuel L. Foster for the purpose of being used by defendants to take rock therefrom. During the last five years of the term the rental was two hundred and fifty dollars per month, payable in advance, and the term expired December 1, 1901. Mary L. Craig testified that she called at the office of the Grays on November 9th preceding the expiration of the lease to see if they wished to renew the lease, but they did not come to any terms. The Grays offered one hundred dollars per month and ten cents per yard for all

over one thousand yards. She told them she wanted two hundred and fifty dollars. She again visited Mr. Gray's office December 2d to order them to take up their tracks. She said, "You were at work to-day and yesterday drilling and taking stone away," and he said, "Why, I thought the lease did not expire until the 12th of December." She said, "It expired on the 1st. Either I wanted the rent or the tracks removed."

She next called December 13th to see why they continued work without paying, and they offered her one hundred and fifty dollars and a certain royalty, which she did not accept.

She returned on the 16th of December "to find out if possible why they are at work without paying, and I got no satisfaction." She further said, "I have not given them permission or consented to their working on any part of that block, nor approved of it, nor given the least intimation of a permission."

The evidence clearly shows that the defendants never consented to pay the two hundred and fifty dollars per month which she demanded, and she never consented that they continue in possession and take rock from the premises unless they would consent to her terms.

Appellants contend that "the court erred in finding that the plaintiff, Samuel Lynde Foster, was entitled to any judgment whatever against the defendants, it having been alleged that before the termination of said written lease, he had transferred all his interest in the said premises to Marion B. Foster," and also that the court erred in finding that Marion B. Foster had no interest in the said premises. These two points may be considered together.

The complaint alleges the making of the lease by Mary Lynde Craig and Samuel Lynde Foster, as lessors, to the defendants, and after proper allegations of the entry under the lease and the holding over it is alleged that Samuel Lynde Foster by gift-deed conveyed all his interest in the premises, before December 1, 1901, to Marion B. Foster. This latter allegation was by the defendants denied, and the record shows no evidence was introduced on the issue.

The court did not expressly find as to whether or not Samuel Lynde Foster did convey to Marion B. Foster, but did find that Marion B. Foster had no interest in said premises.

This may be conceded to be a conclusion of law only.

The findings that were made support the judgment, which is in favor of Mary Lynde Craig and Samuel Lynde Foster. Inasmuch as the defendants denied the allegation of the conveyance from Samuel to Marion and there was no evidence introduced on the issue thus presented, the court would have been obliged to find, if it had made a finding on the issue at all, that no such conveyance had been made. *This would not have changed the judgment at all.* The failure to expressly find on this issue did not, therefore, prejudice defendants.

In *Southern Pacific B. R. Co. v. Whitaker*, 109 Cal. 268, [41 Pac. 1083], it was said: "But conceding that there should have been a special finding as to the assessment and payment of taxes, still it clearly appears from the evidence that if such a finding had been made it must have been in favor of defendants. And this being so the plaintiff was in no way prejudiced by the failure, and the judgment cannot be reversed on this ground." (Citing *Hutchings v. Castle*, 48 Cal. 152; *People v. Center*, 66 Cal. 551, [5 Pac. 263, 6 Pac. 481]; *Murphy v. Bennett*, 68 Cal. 528, [9 Pac. 738]; *Winslow v. Gohransen*, 88 Cal. 450, [26 Pac. 504].)

In this case, if the court had found that a conveyance had been made from Samuel Lynde Foster to Marion B. Foster, the judgment against the defendants would have been the same, but would have been in favor of Mary Lynde Craig and *Marion B. Foster*, while if the court had found that no such conveyance had been made, which as before stated is the only finding that on the record before us could have been properly made, the judgment would still be against the defendants but in favor of Mary Lynde Craig and *Samuel Lynde Foster*, which is the judgment rendered. Marion B. Foster is not complaining, but, as one of the respondents, is asking this court to affirm the judgment.

We find no error prejudicial to defendants, and the judgment and order are affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 47. First Appellate District.—September 19, 1905.]

MARY L. PARSONS, Respondent, v. LOUISA SILVA,
and FRANK SILVA, Appellants.

CONTRACT TO REMOVE MORTGAGE-LIEN—ACTION FOR BREACH—SUFFICIENCY OF COMPLAINT.—A complaint in an action upon a contract executed by a husband and wife to remove a mortgage-lien, which alleges that the mortgage was fraudulently executed by the husband under a power of attorney from plaintiff executed for a different purpose, that he appropriated the proceeds to his own use, that the contract was executed to prevent legal proceedings by plaintiff against the husband, that the contract was broken, and that plaintiff's title was lost under foreclosure of the mortgage, and claiming damages for its alleged value, states a cause of action.

ID.—CONSIDERATION—FORBEARANCE—MONEY RECEIVED AND APPROPRIATED.—The complaint shows a sufficient consideration for the contract sued upon, both in the agreement to forbear legal proceedings against the husband in regard to the iniquitous transaction alleged and to the money received and appropriated by the husband to his own use.

ID.—SUPPORT OF FINDINGS—RESPONSIBILITY OF HUSBAND—CONFLICTING EVIDENCE.—Where there is evidence tending to support all of the findings for the plaintiff, and the evidence was substantially conflicting as to whether the husband or an attorney associated with him in business, and who prepared the papers, received the money, but the testimony of the latter, that he received the check and that the money was immediately turned over to the defendant husband, taken in connection with the fact that defendants by signing the contract sued upon acknowledged the husband's liability to remove the mortgage-lien, amply sustains the finding for plaintiff on that question.

ID.—LEGAL LIABILITY OF PLAINTIFF ON MORTGAGE—EQUITABLE LIABILITY OF DEFENDANT.—It is immaterial whether plaintiff by giving a power of attorney to raise funds on mortgage to carry on an appeal, if taken, and not to be used unless the appeal was taken, of which notice to the contrary was given, made herself legally liable to the mortgagees. It is sufficient that as between herself and her attorney in fact she was not in equity bound by it, but he was, and acknowledged himself to be so bound by executing the agreement sued upon.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

E. A. Holman, and Judson M. Davis, for Appellants.

David Mitchell, Robert L. McKee, and N. J. Donovan, for Respondent.

COOPER, J.—Appeal from judgment on a bill of exceptions.

The amended complaint alleges in substance: That on the twenty-first day of December, 1895, the plaintiff was the owner of a tract of land described in the complaint of the value of six hundred dollars, upon which she desired to secure a loan of five hundred dollars for the purpose of enabling her to appeal to the supreme court from a judgment rendered against her in the superior court of Alameda County; that she consulted defendant Frank Silva, who was acting as a loan agent, in regard to obtaining a loan upon the said real estate, and at Silva's request and by his advice she executed an instrument, making him her attorney in fact for the purpose of executing a mortgage upon the property and securing the loan, and at the same time plaintiff delivered to Silva her title papers; that it was the agreement that the money should not be borrowed, nor the mortgage executed, except for the purpose of obtaining money by which plaintiff could carry on the contemplated appeal, and if plaintiff should subsequently decide to abandon the appeal the defendant, Silva, was not to proceed further with the loan; that subsequently, on the twenty-fourth day of January, 1896, the plaintiff decided to abandon the contemplated appeal and so notified Silva, and demanded of him that the power of attorney be canceled and her title papers surrendered, but Silva stated to plaintiff that he could not find the power of attorney nor the title papers; that prior to January 24, 1896, said Silva had, under the said power of attorney, and without plaintiff's knowledge, executed a note and mortgage upon said land to one Rauer for five hundred dollars, which sum defendant Silva received and appropriated to his own use, no part of which was received by plaintiff; that the mortgage and power of attorney were not placed of record until about six months after the mortgage was executed, and plaintiff then for the first time discovered the fact, and thereupon immediately went to defend-

ant Frank Silva for an explanation, and he denied that he ever executed the note and mortgage, or that he ever received the five hundred dollars, or that he knew anything about the placing of the power of attorney or mortgage upon record; that afterwards, when threatened with legal proceedings by plaintiff, in order to satisfy her and to get her to forbear such contemplated proceedings, defendants, who are husband and wife, executed an agreement in writing of which the following is a copy, to wit:—

“Whereas, I, Frank Silva, some time ago was appointed under power of attorney to act for M. L. Parsons in respect of certain property situate in Tulare County, being a ranch there claimed by her, and whereas said power of attorney authorized F. Silva to borrow certain money to carry on an appeal by said M. L. Parsons to the Supreme Court, and whereas Mrs. Parsons notified said Silva not to proceed further in respect of said appeal, and also notified one Burris therein acting as counsel and adviser; And whereas it now appears on record against said property a mortgage for \$500.00, it is hereby declared by said Silva that no such sum was ever raised or paid to him either personally or as acting under said power of attorney or otherwise; and that if said mortgage exists, or is recorded as aforesaid, same is in fraud, and void for want of consideration and authority. Be it therefore witnessed, that we, the undersigned, do jointly and severally guarantee to said M. L. Parsons (in consideration that she is in no way responsible for same) to investigate and clear from the records said mortgage in order that she may be in the same position in respect of said property as when she granted said power of attorney to said Silva; and we will pay Mr. Mitchell all his charges for attorney fees and costs of clearance.

“Witness our hands and seal this 16th day of September, 1896.

“FRANK SILVA.

“LOUISA SILVA.”

That plaintiff relied upon defendants to carry out said contract and clear the records of said mortgage, all of which they failed to do, and by reason of said failure the said mortgage was foreclosed, and the said property sold and lost to

plaintiff without any fault on her part; that defendants have never redeemed said property, nor restored it to plaintiff, nor paid her its value or any sum or at all; that by reason of the said failure of defendants to keep the said contract and clear the records of said mortgage, as they agreed to do, plaintiff has lost her property and been damaged in the sum of six hundred dollars.

The demurrer was properly overruled. The consideration for the agreement was that plaintiff would forbear to institute legal proceedings in regard to an iniquitous transaction by Frank Silva, the husband of defendant Louisa Silva; and not only this, but the money which Frank Silva had received and appropriated to his own use was a consideration for the agreement.

The findings are supported by the evidence. It may be that Burris, who was associated with defendant Frank Silva in business, and who prepared the papers, appropriated the money and that Frank Silva did not receive any part of it, but as to this the evidence is squarely in conflict. Burris testified that he received the check, and "the money was immediately turned over to Mr. Silva." Taking the testimony of Burris in connection with the fact that defendants, by signing the written agreement, practically acknowledged the liability of defendant Frank Silva, the finding of the court is amply supported. The question as to whether or not plaintiff was responsible for the mortgage is immaterial. She had made herself responsible to the mortgage by executing the power of attorney. As between herself and defendant Frank Silva she was not responsible for it,—that is, she was not in equity bound for it, but Silva was, and acknowledged himself to be so bound by executing the agreement.

The judgment is affirmed.

Harrison, P. J., and Hall, J., concurred.

[No. 52. First Appellate District.—September 19, 1905.]

WILLIAM C. BISSELL, Appellant, v. **SHERIDAN FORBES**, **LOUISE MILLS FORBES** et al., Respondents.

PROMISSORY NOTE—INSTALLMENTS—STATUTE OF LIMITATIONS.—Where a promissory note is payable in monthly installments, the statute of limitations begins to run against each installment from the time when an action might have been brought upon it.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

William C. Bissell, for Appellant.

Wright & Wright, for Respondents.

COOPER, J.—Action to recover on a promissory note, and to obtain a decree of foreclosure of a mortgage given as security therefor.

The court below held that the promissory note, except the last installment, was barred by the statute of limitations, and gave judgment for the last installment only, with a decree of foreclosure. From this judgment plaintiff prosecutes this appeal.

The sole question here is as to the construction to be placed upon the promissory note, which reads as follows:—

“\$482.40. **SAN FRANCISCO, CAL., Oct. 27th, 1893.**

“On or before three years after date for value received, we promise to pay to Wm. C. Bissell, or order, the sum of four hundred eighty-two and 40/100 (482.40) dollars in United States gold coin with interest at the rate of eight per cent per annum, payable monthly. Payments shall be made as follows: Eighty (\$80) dollars on the first day of November, 1893, and the balance in monthly installments of not less than twelve and 50/100 (\$12.50) dollars including interest and principal, on the first day of each and every month

thereafter until both principal and interest are fully paid
This note is secured by a mortgage bearing even date herewith.

“SHERIDAN FORBES,
“LOUISE MILLS FORBES.”

The action was commenced October 16, 1900, and in time if the whole of the note became due October 27, 1896, and not before, but not otherwise. The note was made in contemplation of all the payments being made within three years after its date, but it contains the express agreement that eighty dollars was to be paid November 1, 1893, and \$12.50 on the first of each and every month thereafter. There is no ambiguity as to this. The parties agreed to it, and it is not for the courts to make contracts for them. It is elementary that the statute of limitations commences to run from the time an action might be brought. If the first installment, eighty dollars, was not paid November 1, 1893, the plaintiff could immediately have commenced an action to recover said amount, and to foreclose his mortgage to that extent, and so of the \$12.50 due December 1, 1893, and of each subsequent installment. It is precisely as though a promissory note had been given for the eighty dollars, and for each payment of \$12.50. The defendants agreed to pay the whole sum on or before three years from date, but they agreed to pay the separate installments at the times provided for in the note.

The meaning of the language is plain. Defendants understood what they had agreed to do, and plaintiff must be presumed to have known the time when the installments of the note matured. (*Ewer v. Myrick*, 55 Mass. 16; *Grattan v. Wiggins*, 23 Cal. 16.) The result is unfortunate for plaintiff, but we cannot relieve him on the ground. If the defendants desire to shield themselves by the statute of limitations, they have the right to do so.

The judgment is affirmed.

Harrison, P. J., and Hall, J., concurred.

[No. 59. First Appellate District.—September 19, 1905.]

EDWARD E. DODGE, Respondent, v. BOARD OF
POLICE COMMISSIONERS et al, Appellants.

MANDAMUS—STATUTE OF LIMITATIONS—REINSTATEMENT OF POLICEMAN
DISMISSED.—An application for a writ of mandate to compel the
police commissioners of the city and county of San Francisco to
reinstate a patrolman of the police force dismissed by them nearly
nine years prior to the application is barred by subdivision 1 of
section 338 and by section 343 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the
City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Franklin K. Lane, City Attorney, for Appellants.

T. C. West, and H. M. Owens, for Respondent.

COOPER, J.—Application for writ of mandate.

The petition alleges that the defendants, acting as the
board of police commissioners of the city and county of San
Francisco, did on or about the twelfth day of June, 1893,
dismiss the plaintiff from his position of patrolman of the
police force of the city and county of San Francisco. The
petition for the writ was filed March 6, 1902.

In the case of *Jones v. Board of Police Commissioners*,
141 Cal. 96, [74 Pac. 696], an action similar to the present,
it was held that the cause of action was barred by subdivi-
sion 1 of section 338 of the Code of Civil Procedure, and
also by section 343 of the Code of Civil Procedure. That
case was followed and approved by this court in *Farrell v.*
Board of Police Commissioners, filed May 24, 1905, *ante*
p. 5, [81 Pac. 674].

Under the authority of these cases the judgment in this
case is reversed.

Harrison, P. J., and Hall, J., concurred.

[No. 61. First Appellate District.—September 20, 1905.]

D. E. PERRY, Appellant, v. J. NOONAN LOAN COMPANY, Respondent.

ASSUMPSIT—VALUE OF SERVICES—CONFLICTING EVIDENCE—ORDER GRANTING NEW TRIAL.—In an action of *assumpsit* where the evidence was substantially conflicting as to the value of the services rendered, the trial court was justified in granting a new trial for insufficiency of the evidence to sustain the verdict of the jury.

ID.—PROPOSED STATEMENT—ADMISSION AND CONSENT—RESERVED OBJECTION—PRESENTATION WITHOUT NOTICE.—Where the correctness of a proposed statement on motion for new trial was admitted, and a consent given that it might be settled, reserving only the right to object that the statement was not presented in time, without reserving any right to be present at the settlement, the right to propose amendments to the statement was waived, and the moving party was authorized to present the statement for settlement without notice to the other party.

ID.—RIGHTS OF JUDGE—SHOWING OF OBJECTIONS—RULING AND EXCEPTION TO BE INCORPORATED IN STATEMENT.—The judge who settled the statement was not required to enter upon a personal investigation of the sufficiency of the objection which the opposite party had “reserved the right” to make, but was at liberty to assume that as he had failed to specify any fact or reason in support of the objection, and did not appear to make it, it was without foundation. Any matter in support of it, with a ruling and exception thereupon, should have been incorporated by the objecting party in the statement, and made part of the record. Any ruling upon the objection cannot be deemed excepted to, and any matter of objection outside of the statement cannot be considered.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Frank W. Sawyer, for Appellant.

Walter E. Dorn, for Respondent.

HARRISON, P. J.—This action was brought to recover the value of services rendered by the plaintiff to the defendant during the two years prior to the commencement of the action, the amount claimed being six thousand dollars. The cause was tried by a jury, and a verdict rendered in favor of

the plaintiff for \$1,520. Thereafter the court granted the defendant's motion for a new trial "on the ground of the insufficiency of the evidence to justify the verdict rendered herein." From this order the plaintiff has appealed. Being an action of *quantum meruit*, the amount to be recovered depended upon the testimony of witnesses as to the value of the services, and on this point there was a marked conflict in the testimony. In his complaint the plaintiff alleged their value to be two hundred and fifty dollars per month, and at the trial there was testimony on his behalf placing their value at different sums from two hundred and fifty to three hundred dollars per month, while on the part of the defendant witnesses placed their value at from sixty-five to one hundred and fifty dollars per month. There was also testimony tending to show that the plaintiff had been paid a large portion, if not all, of the amount that he was entitled to under testimony on behalf of the defendant. The court was therefore fully authorized to grant a new trial.

The appellant urges that the court erred in granting the motion for the reason that the statement of the case, upon which the motion was made, was not presented to the plaintiff within the time allowed by law therefor; and that therefore it was improperly settled by the judge and should not have been considered by him. The following are the facts relied upon in support of this position, viz. :—

The verdict of the jury was rendered December 9, 1901. The defendant gave notice of its intention to move for a new trial December 19, 1901. At the close of the statement to be settled is the following :—

"The defendant proposes the foregoing as his statement on motion for a new trial.

"Dated March 25, 1902.

"WALTER E. DORN,
"Attorney for Defendant."

Directly underneath is the following :—

"The foregoing statement is correct and may be settled and allowed subject to the right to object as heretofore reserved as not prepared and presented in time.

"Dated March 25, 1902.

"F. W. SAWYER,
"Attorney for Plaintiff."

This is followed by the following certificate of settlement:—

“The foregoing statement is correct, and is hereby settled and allowed.

“Dated April 2, 1902.

“JOHN HUNT,

“Judge of Superior Court.”

It does not appear from the record whether the plaintiff was present or absent at the time of the settlement of the statement. His admission of its correctness and consent that it be settled was a waiver of his right to propose amendments thereto, and authorized the defendant to present it to the judge for settlement without any notice to him. (Code Civ. Proc., sec. 659, subd. 3.) If there were any facts or reasons in support of the objection now urged he could have reserved the right in his stipulation to be present at the settlement, and he should have then appeared and presented them to the judge and obtained a ruling upon their sufficiency; and if such ruling was adverse, should have taken an exception thereto. The matters so presented, together with the ruling and his exception, should have been incorporated into the statement, and made a part of the record, and they could then be considered by the court in hearing the motion, and also upon an appeal therefrom. When the statement was presented to the judge for settlement he was not required to enter upon a personal investigation of the sufficiency of the objection which the plaintiff had “reserved the right” to make, but was at liberty to assume that as he had failed to specify any fact or reason in support of such objection, and did not appear to make the objection, it was without foundation. If, however, it be assumed that the plaintiff was present at the settlement it does not appear that he made any objection thereto; but if it be further assumed that he made the objection which he had reserved the right to make, and that it was overruled by the court, the record does not show that he took any exception to such ruling. Section 647 of the Code of Civil Procedure does not include such ruling within those which are deemed excepted to.

In *Cole v. Wilcox*, 99 Cal. 549, [34 Pac. 114], the defendant objected to the settlement of the statement upon the ground that the same was not served in time, in reference to which the court said: “A mere objection to the settlement of the

statement without pointing out the basis or the grounds of the objection, or presenting the facts upon which it was made, was not fair to either the judge or the opposite party, and even if an exception had been taken to the ruling of the judge upon such objection the party taking the exception would not have the right to its consideration upon appeal. When the motion for a new trial came on to be heard the court in its action thereon was limited to considering the matters contained in the statement, and was not at liberty to go outside of the statement for the purpose of determining whether the new trial should have been granted or refused."

The order is affirmed.

Cooper, J., and Hall, J., concurred.

[Crim. No. 8. Third Appellate District.—September 21, 1906.]

THE PEOPLE, Respondent, v. SAM PELTIN, *alias* VICTOR PETERSON, Appellant.

CRIMINAL LAW—GRAND LARCENY—SUFFICIENCY OF INFORMATION—DESCRIPTION OF MONEY STOLEN—GROUNDS OF DEMURRER NOT SHOWN.—An information for grand larceny which describes the property stolen as "about" eighty dollars lawful money of the United States, shows with sufficient definiteness and certainty that more than fifty dollars were stolen, as against a general demurrer, or where the record does not disclose whether the demurrer was general or special.

ID.—USE OF WORD "ABOUT"—COMMON UNDERSTANDING.—The word "about" is frequently used as a synonym for the word "nearly" or "approximately." When a person of common understanding would readily know what is meant, and no substantial right is infringed, the information must be upheld.

ID.—EVIDENCE—MONEY STOLEN FROM CASH REGISTER—MARKED, MUTILATED, AND COUNTERFEIT PIECE—POSSESSION OF DEFENDANT.—Where the money was taken from the plaintiff's cash register, which contained a marked and mutilated half-dollar piece, assuming it to be counterfeit, evidence is admissible to show the possession thereof by the defendant when arrested, as tending to connect the defendant with the commission of the offense charged.

ID.—MONEY ON PERSON OF DEFENDANT—EVIDENCE OF PRIOR CONDITION.—Where money was found on the person of the defendant when

arrested, evidence is admissible to show that he had no money just before the crime was committed.

1D.—CREDIT OF DEFENDANT.—It was not error to exclude evidence that the credit of the defendant was good and that he could have borrowed money, in the absence of any showing that he did in fact borrow it.

1D.—PRESUMPTION FROM POSSESSION—GOOD CHARACTER—REFUSAL OF REQUESTED INSTRUCTION.—It was proper to refuse a requested instruction that the presumption arising from possession alone of stolen property is removed by evidence of good character, as tending to invade the province of the jury, where the evidence of good character was not general, and was partially neutralized by circumstances in proof, such as masquerading by the defendant under an assumed name.

1D.—INSTRUCTIONS BASED ON EVIDENCE OF RECENT POSSESSION—CONSTRUCTION OF INSTRUCTIONS.—An instruction as to recent possession of stolen property, based on evidence that when arrested defendant had upon his person the exact number of five and twenty dollar pieces taken from the cash register, is to be taken in connection with other instructions given, which make the instructions bearing on that question a full and correct statement of the law.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

E. W. Holland, for Appellant.

U. S. Webb, Attorney-General, and J. C. Daly, Deputy Attorney-General, for Respondent.

McLAUGHLIN, J.—The defendant was convicted of grand larceny, and appeals from the judgment and from the order denying his motion for a new trial.

The first contention of appellant is that the information is indefinite and uncertain, because the property stolen is described as being "about eighty dollars lawful money of the United States of America." This contention cannot be sustained. The word "about" is frequently used as a synonym for the word "nearly" or "approximately," and such use is sanctioned by definitions found in the various standard dictionaries. Understood in this sense, it cannot be said that the information in the case at bar fails to charge the larceny

of more than fifty dollars, or that there is any material uncertainty as to the value of the property stolen. The use of qualifying words is not commended, for the value of the property taken should be clearly and definitely stated in an information for grand larceny. But when a person of common understanding would readily know what is intended, and no substantial right of a defendant is infringed, the information must be upheld. (Pen. Code, secs. 957, 959, 960.) We are not informed as to the grounds upon which the demurrer is based, and therefore cannot know whether it was general or special, and it has been held that in the absence of a special demurrer such a statement as to value is sufficient. (*People v. Richards*, 136 Cal. 128, [68 Pac. 477].)

A marked and mutilated half-dollar piece which was in the looted cash register was found on the person of the defendant when he was arrested a short time after the crime was committed. Evidence to this effect was received and the coin was admitted as an exhibit in the case against defendant's objection. It is now urged that such rulings were erroneous, because the coin was counterfeit, and proof of its theft could not sustain the charge made. True, the defendant was charged with stealing lawful money, but conceding the proposition of law relied upon, and also assuming that the coin was counterfeit and not merely mutilated, it does not follow that it was error to admit the evidence complained of. This coin was clearly identified as an article taken from the cash register at the time the crime was committed, and the evidence objected to was admissible for the same reason that would make a knife, chain, or other article proper evidence under similar circumstances. It connected defendant with the commission of the offense, and tended strongly to show that he was the person who opened the cash register and abstracted its contents.

It was not error to admit evidence showing that the defendant had no money just before the crime was committed. (*People v. Kelley*, 132 Cal. 430, [64 Pac. 563]; *People v. Sullivan*, 144 Cal. 471, [77 Pac. 1000].) Nor was it error to exclude evidence to prove that defendant's credit was good and that he could have borrowed money. If he did in fact borrow money, evidence to that effect would be admissible, but his ability to do so could have no bearing on the case, and

could not in the slightest degree tend to account for the money found on his person.

The court refused to instruct the jury that "the presumption arising from possession alone of stolen property is removed by evidence of the good character of the defendant." This is assigned as error, but giving *People v. Hurley*, 60 Cal. 77, [44 Am. Rep. 55], due weight as authority, touching the legal proposition there declared, we think such instruction was properly refused. The court was not privileged to invade the province of the jury and determine the weight to be given evidence in the case. The evidence as to good character was based largely on personal acquaintance and knowledge rather than general reputation, and circumstances, such as masquerading under an assumed name, tended to neutralize its effect. If this instruction could be proper under any state of facts, it certainly would not have been proper in the case at bar. The instruction touching the recent possession of stolen property must be read in connection with other instructions, and this done, the instructions bearing on this phase of the case contained a full and correct statement of the law. (*People v. Etting*, 99 Cal. 578, [34 Pac. 237].) The defendant when arrested had upon his person the exact number of five and twenty dollar pieces taken from the cash register, and the total amount found in his pockets was within a few cents of the sum stolen. The instruction was therefore based on evidence in the case regardless of the mutilated or counterfeit coin heretofore mentioned. There was no misconduct on the part of the district attorney. That the defendant was known by another name is not contradicted, and this was the essential part of the statement objected to. The evidence was entirely sufficient to sustain the verdict. The judgment and order are affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 46. Third Appellate District.—September 21, 1905.]

FRANK J. SANTOS, Respondent, v. A. J. SILVA, Appellant.

APPEAL FROM JUDGMENT—SUFFICIENCY OF FINDINGS—STATUTE OF LIMITATIONS.—Upon an appeal from the judgment, where the findings show the date when the cause of action accrued, from which it appears that it is not barred by the statute of limitations, the failure of the court to make an express finding upon a plea of the statute of limitations does not render the findings insufficient to support the judgment for the plaintiff.

ED.—OMISSION TO FIND UPON DISPUTED ITEM—REMISSION BY RESPONDENT—MODIFICATION OF JUDGMENT.—Where the respondent confessed error in the omission to find upon a disputed item, as to which respondent has filed a written waiver and release of the judgment and interest thereon, the judgment will be modified accordingly, and affirmed as so modified.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

Hopkins & Hinsdale, for Appellant.

J. Frank Brown, for Respondent.

McLAUGHLIN, J.—This is an appeal from a judgment resting on the judgment-roll alone. The only question presented is the sufficiency of the findings to support the judgment. The court made no express finding on the statute of limitations, pleaded as a defense to the first cause of action set forth in the complaint, and such failure is assigned as error. The findings, however, clearly show the date when this cause of action accrued, and from this it is apparent that the cause of action was not barred by the statute. This was sufficient. (*Ready v. McDonald*, 128 Cal. 664, [79 Am. St. Rep. 76, 61 Pac. 272]; *Paine v. San Bernardino*, 143 Cal. 656, [77 Pac. 659]; *Krasky v. Wollpert*, 134 Cal. 338, [66 Pac. 309]; *Warren v. Hopkins*, 110 Cal. 512, [42 Pac. 986]; *Breeze v. Brooks*, 97 Cal. 77, [31 Pac. 742]; *Baum v. Roper*, 145 Cal. 116, [78 Pac. 466]; *Eva v. Symans*, 145 Cal. 202, [78 Pac. 648].)

The court omitted to find touching a disputed item of \$154.20, and the respondent, upon the argument, confessed error in this regard, and filed a written waiver and release of the judgment to the extent of this sum and the interest thereon, amounting to \$26.03, and asked that the judgment be modified accordingly and as so modified that the judgment be affirmed. This course would render the error utterly harmless to appellant.

The judgment is therefore modified by striking out said items, and by reducing the total amount thereof to the sum of \$790.73. As so modified the judgment is affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 52. Third Appellate District.—September 21, 1905.]

MRS. H. T. DRAKE, Appellant, v. H. G. DE WITT, and
MABEL DE WITT, Respondents.

ATTACHMENT—CONTRACT MADE AND PAYABLE OUT OF STATE.—The right to an attachment in this state is purely statutory, and does not extend to a contract made out of the state and which does not expressly provide for payment in this state.

ID.—CONTRACT FOR COMMISSIONS EARNED IN ANOTHER STATE—PRESUMPTION AS TO PLACE OF PAYMENT.—A contract to pay commissions on sales to be made by plaintiff in another state, executed and performed in such other state, must be presumed to intend that payment is due where the contract was made and the services were rendered.

APPEAL from an order of the Superior Court of Fresno County dissolving an attachment. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

A. M. Drew, and F. H. Short, for Appellant.

Harris & Harris, for Respondents.

McLAUGHLIN, J.—Plaintiff appeals from an order dissolving an attachment. The action in which such attachment

was issued was brought to recover commissions earned by H. T. Drake, plaintiff's assignor, under a written contract made in the state of Minnesota.

Under such contract said Drake agreed to take the St. Paul agency for the sale of California lands owned, controlled, or held under contract by defendant, H. G. De Witt, and under the terms of the agreement Drake was "entitled to the sole agency for St. Paul, Minnesota, while engaged in the sale of these lands." Commissions were to be paid when a sale was influenced by Drake, but was finally effected at the home office in California. Monthly reports from the California office were to be sent to Drake, and commissions earned were to be paid in money or land at his option. The defendants reside in California; the plaintiff in Minnesota.

The right to have an attachment issue is purely statutory, and the person claiming such right must show affirmatively that the contract agreed upon falls within the provisions of section 537, Code of Civil Procedure. In an early case involving the construction of a similar statute it was said: "The universally admitted rule of construction requires effect to be given, if possible, to every part of a law. We can only follow the rule in this case by denying the right of attachment except where the contract is made within the state, or if made without it, then accompanied by a stipulation between the parties to it that the money is to be paid here." (*Dulton v. Shelton*, 3 Cal. 208.) This construction has been adhered to for more than fifty years, and "upon well-settled principles the court must regard the construction given to the statute in that case as a correct interpretation of the intention of the legislature." (*Eck v. Hoffman*, 55 Cal. 502; *Tuller v. Arnold*, 93 Cal. 168, [28 Pac. 863].) The contract before us shows on its face that it was made and was to be performed by Drake in the state of Minnesota. There is nothing to indicate that commissions earned were to be paid in California. The stipulations touching monthly reports, and commissions on sales influenced by Drake but consummated here, evince a contrary intention, and the presumption is that payment was due where the contract was made and the services were rendered. (*Bishop on Contracts*, sec. 1391.) What the rights of plaintiff might have been had she elected to receive payment in land is a question not before us for decision.

Suffice it to say that this clause in the contract does not aid appellant's contention here. Her right to an attachment in any event depends upon the view that this was a contract for the direct payment of money, and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state.

There is no express or even implied stipulation to this effect in the contract, and the order is therefore affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 55. Third Appellate District.—September 21, 1905.]

WILLIAM HEESER, Respondent, v. JOHN TAYLOR, as Administrator, etc., Appellant.

ESTATES OF DECEASED PERSONS—MORTGAGE—PRESENTATION OF CLAIMS —WAIVER—FORECLOSURE.—It is not necessary to present a mortgage claim against the estate of a deceased person in order to foreclose the mortgage, where the complaint of the mortgagee waives all recourse against any other property of the estate.

Id.—STATUTE OF LIMITATIONS—MORTGAGE DEBT NOT MATURE AT DEATH OF DECEDENT.—Notwithstanding the mortgage debt was not mature at the death of the decedent, and more than four years elapsed from its maturity before foreclosure, yet it is saved from the bar of the statute by the concluding clause of section 353 of the Code of Civil Procedure, where the foreclosure suit was begun within one year after the issuing of letters testamentary or of administration.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Thomas, Pemberton & Thomas, for Appellant.

T. L. Carothers, for Respondent.

McLAUGHLIN, J.—This is an action to foreclose a mortgage on real property. The defendant demurred to the complaint upon the general ground that no cause of action was

stated therein, and also on the special ground that the cause of action pleaded was barred by the provisions of sections 312 and 337 of the Code of Civil Procedure. The demurrer was overruled, and, defendant declining to answer, judgment of foreclosure was entered. From this judgment defendant appeals.

The complaint stated a cause of action. The plaintiff expressly waived all recourse against any other property of the estate, and hence no presentation of his claim was necessary. (Code Civ. Proc., sec. 1500; *McGahey v. Forrest*, 109 Cal. 67, [41 Pac. 817]; *Visalia Savings Bank v. Curtis*, 135 Cal. 352, [67 Pac. 329]; *Weinrich v. Hensley*, 121 Cal. 656, [54 Pac. 254].)

The principal question remaining relates to the defense of the statute of limitations. It appears from the complaint that the note and mortgage in suit were executed by Thomas Boyle to L. E. White, the assignor of plaintiff, on September 19, 1878. The note was for the sum of three hundred and sixty dollars, bearing interest at the rate of one and one half per cent per month from date, and was payable one year after its date. Thomas Boyle died on December 16, 1878, but no administration of his estate was had until February 3, 1904, when letters of administration were issued to the defendant. The mortgage and the assignment thereof were duly recorded. It is apparent from the foregoing statement that the note was not due at the time of Boyle's death, and upon this fact rests appellant's contention that the cause of action was barred when this action was commenced.

It is said in this behalf that section 312 of the Code of Civil Procedure requires that all actions upon contracts in writing, without exception, be commenced within four years after maturity, and that the cause of action here is not embraced in any of the special classes mentioned in that section. This conclusion is based on the assumption that the cause of action is not saved by the concluding clause of section 353 of the same code, because no cause of action was ripe when Boyle died, and hence he was not a person against whom an action might be brought within the meaning of that section. In other words, appellant claims that section 353 applies only to cases where the running of the statute had commenced before the death of the payor. *Tynan v. Walker*, 35 Cal. 634, [95

Am. Dec. 152], and *Hibernia S. and L. Society v. Conlin*, 67 Cal. 178, [7 Pac. 477], are cited as sustaining this view, and it is earnestly argued that the decision to the contrary in the case of *In re Bullard*, 116 Cal. 355, [48 Pac. 219], is not supported by reason or the statute. It could serve no useful purpose to indulge in critical analyses of the decisions bearing upon the question before us. In the last-mentioned case the question to be decided here was squarely presented and decided, and, notwithstanding the fact that both of the cases relied upon by appellant were there considered, it was held "that the statute of limitations does not begin to run where no administration exists on the decedent's estate *at the time the cause of action accrued*." (*In re Bullard*, 116 Cal. 355, [48 Pac. 219]; *Smith v. Hall*, 19 Cal. 85.)

The very recent case of *Hibernia S. and L. Society v. Boland*, 145 Cal. 627, [79 Pac. 365], is "on all-fours" with the case at bar, and the rule announced in *In re Bullard* was there followed.

It is useless to expect this court to ignore or attempt to nullify a rule thus plainly declared and sanctioned by our highest court. Chaos must be the inevitable result if the rights of citizens are to be measured by one rule in that forum and by varied and different rules in the district courts of appeal. Certainty in the administration of justice is essential to the security of personal and property rights, and it needs no argument to convince that conflicting or contradictory decisions, creating uncertainty and confusion, could only impair the usefulness of our present appellate courts, and render harmful a system which it was hoped might prove beneficial. A hotchpotch of conflicting decisions would create intolerable conditions, as unnecessary as they would be deplorable. The district courts of appeal were not created for the purpose of revising or overruling the decisions of the supreme court, and no such power will be here exercised or assumed. Should a justice of this court entertain views irreconcilably in conflict with a decision of the supreme court, such justice will no doubt fearlessly exercise his privilege of dissent. Should all the justices concur in the view that a decision of the supreme court should be overruled, we will manifest our high confidence in that tribunal by courteously calling attention to the supposed error, and requesting that

the cause before us, involving the application of the rule or principle questioned, be transferred to that court for final adjudication. In this way we may be relieved from the necessity of blindly following all decisions, however erroneous some of them may seem, and, at the same time, avoid the dangers attendant upon varied and conflicting decisions touching the same legal principle or abstract right. It is the privilege and duty of every attorney in this state to combat and seek to overthrow judicial precedents which are deemed erroneous, and we would not be understood as discouraging the full and fearless performance of this high duty, nor as minimizing the potency of fair, manly, and intelligent criticism in molding and perfecting a harmonious and correct system of authoritative precedents. No higher tribute could be paid to any court than to seek relief from the effect of error in the court where the error was committed. We invite respectful yet fearless criticism, and will be quick to examine and answer appeals to correct errors here committed; but all must realize that the binding force of decisions by our court of final review can only be impaired or destroyed by the tribunal in which such decisions were rendered. It is but fair to counsel for appellant to remark that the argument which induces the foregoing statement was originally addressed to the supreme court, but similar arguments are frequently addressed to district courts of appeal, and a sense of duty to members of the bar compels us to state our view touching the powers of this court in the premises.

In the case at bar there is no dissent from the rule declared in the case of *In re Bullard*, 116 Cal. 355, [48 Pac. 219]. The purpose of a law furnishes an unerring guide to its correct interpretation, and we are satisfied that such rule is in consonance with the reason and purpose, and is within the scope, of section 353 of the Code of Civil Procedure. It is clear to our minds that the amendment to section 312 of the same code could not and did not affect the interpretation placed upon section 353. The interest was payable from the date of the note, and hence the judgment cannot be modified as suggested. (*Casey v. Gibbons*, 136 Cal. 370, [68 Pac. 1032]; *Kohler v. Smith*, 2 Cal. 597, [56 Am. Dec. 369].) No equitable question of laches is here involved, and we cannot decide questions which are not before us.

This case is a harsh one, but inexorable rules of law, binding alike on litigants and courts, must be followed, and hence the judgment must be and is hereby affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 53. Third Appellate District.—September 21, 1905.]

OTTO GRUNSKY, and J. F. DIETRICH, etc., Respondents,
v. J. L. FIELD, Appellant.

ACTION FOR BROKERS' COMMISSIONS ON SALE OF REALTY—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.—In an action to recover brokers' commissions on the sale of real estate, where the court found, upon substantially conflicting evidence, that the property was sold, and that the sale resulted through the efforts of the plaintiffs, such finding will not be disturbed upon appeal.

10.—STIPULATION—SUBMISSION UPON RECORD OF FORMER JURY TRIAL—REPORTER'S NOTES—EXCEPTIONS NOT RESERVED OR REVIEWED.—A stipulation that the cause be submitted to the court for decision upon the record of a former trial before a jury as shown by the reporter's notes taken upon such former trial, without expressing any reservation of rulings and exceptions taken upon the former trial, does not require the trial court to review them; and in the absence of any showing that the trial court actually passed thereon, the appellant from its decision cannot have them reviewed in this court.

10.—DUTY OF APPELLANT—PRESUMPTIONS UPON APPEAL—INTENT OF STIPULATION—ABSENCE OF CONSENT OF COURT.—It is the duty of the appellant to show error affirmatively, and every intendment is in favor of the action of the trial court; and where it is not clearly apparent from the record that the parties and the court understood that the stipulation included exceptions formerly taken, it must be presumed that nothing of the kind was intended, and that the court did not consent thereto,—the parties being powerless to make up a new record based upon the former rulings without the consent of the court.

10.—ERROR REMOVED BY CONSENT—ESTOPPEL OF APPELLANT.—He who consents to an act is not wronged by it; and acquiescence in error takes away the right of objecting to it. In the absence of an express agreement to that effect sanctioned by the trial court, the appellant will not be allowed to predicate error on a record to which he has consented.

APPEAL from a judgment of the Superior Court of San Joaquin County. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

A. E. Percival, and Louttit & Middlecoff, for Appellant.

Nicol & Orr, for Respondents.

MCLAUGHLIN, J.—Defendant prosecutes this appeal from the judgment and from an order denying his motion for a new trial. The action was brought to recover commissions on a sale of real estate, under a contract which reads as follows: "Field Ranch March 11, 1903. In consideration of one dollar the receipt of which is hereby acknowledged, I authorize Grunsky & Dietrich, for five months, to sell my farm of 160 acres, including standing crop, for \$65.00 per acre, and I agree if any sale results through the efforts of said Grunsky & Dietrich, at above or less price, to pay them the commissions of 5 per cent. J. L. FIELD."

On April 17, 1903, the property was sold to C. J. Bender for the sum of \$10,400. and the court found that such sale resulted through the efforts of the respondents.

The main point urged upon this appeal is that such finding is not supported by the evidence. An examination of the record, however, discloses a substantial conflict in the evidence on this point, and under the well-settled rule such finding will not be disturbed. (*White v. Beer*, 105 Cal. 9, [38 P. c. 513]; *Taylor v. McConigle*, 120 Cal. 125, [52 Pac. 159]; *Raymond v. Glover*, 144 Cal. 548, [78 Pac. 3].)

The bill of exceptions shows that upon a former trial of the cause, the jury disagreed and that upon the second trial, which was before the court without a jury, the respective parties, in open court, stipulated and agreed: "That the cause be submitted to the court for decision upon the record of a former trial of this action before a jury as shown by the reporter's notes taken upon such former trial." The cause was thereupon argued and submitted for decision, upon such record, a copy of which is set forth in the bill of exceptions.

Numerous assignments of error, based upon rulings made and exceptions reserved at such former trial, are urged by appellant, but respondents insist that rulings made at the

first trial cannot be reviewed upon this appeal, for the reason that the stipulation contains nothing to warrant such review or justify the assumption that the rulings of the court would have been the same at the second as at the first trial. The stipulation contains no recital saving or reserving objections or exceptions taken at the first trial, and there is nothing in the record here to indicate that the trial court reviewed or passed upon the alleged errors when the motion for a new trial was heard. No authorities have been cited to sustain or defeat respondents' contention, and none have been found which bear upon the novel question thus presented.

It is the duty of an appellant to show error affirmatively, and every intendment favors the action of the trial court. (*People v. Douglas*, 100 Cal. 1, [34 Pac. 490]; *Landers v. Bolton*, 26 Cal. 393; *Doyle v. Franklin*, 48 Cal. 537.) It follows that unless the legal effect of the stipulation is to compel such review, or it is clearly apparent from the record that the parties and the court understood that such should be its effect, we must presume that nothing of the kind was intended.

There is nothing in the subsequent conduct of the parties as shown by the record here to throw any light on the intention of the parties; hence it must be assumed that the stipulation fully and clearly expresses the intention of the parties thereto.

At the time the stipulation was made the parties to the action stood at the threshold of a new trial. The record of the former trial was *functus officio*, and they were about to make up a new record upon which the cause would be decided and reviewed. (Code Civ. Proc., secs. 646, 650, 657, 661.) Under these circumstances, by full consent of the appellant, the cause was submitted *for decision* upon the old record, which was impotent to help or harm him until such consent was given. It is clear that the parties to the action could not by stipulation or otherwise forecast the action of the trial court. They were powerless to make up a new record based upon the assumption that the same rulings would be made at the new as at the former trial, unless the court clearly and distinctly consented to such an arrangement. No such consent is here shown. There is nothing in the stipulation hinting at the proposition that the parties agreed and the court consented to have objections, rulings, and exceptions at the

former trial, considered as made and reserved at the new trial.

Under such circumstances we are of the opinion that the assignments of error above mentioned cannot be considered. Moreover, the effect of granting a new trial would virtually be to ignore appellant's act in consenting to and sanctioning this record, and to place him in a position practically the same as that occupied by him before he entered into the stipulation.

We believe that where a party to an action is entitled to a rehearing in the trial court, he cannot waive such right and then expect the appellate court to award him privileges and opportunities thus voluntarily relinquished. "He who consents to an act is not wronged by it." And "acquiescence in error takes away the right of objecting to it." Therefore, in the absence of an express agreement to that effect sanctioned by the trial court, the appellant will not be allowed to predicate error on a record to which he consented. This is the rule applied in analogous cases, and we think it should be applied here. (*Hess v. Bolinger*, 48 Cal. 354; *Brewster v. Hartley*, 37 Cal. 15, [99 Am. Dec. 237]; *Gregory v. Gregory*, 102 Cal. 52, [36 Pac. 364]; *Muller v. Rowell*, 110 Cal. 319, [42 Pac. 804].)

The judgment and order are affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 66. First Appellate District.—September 23, 1905.]

MATILDA QUIGLEY, Respondent, v. CHARLES R. ELLENWOOD, Appellant.

UNLAWFUL DETAINER—SERVICE OF SUMMONS BY PUBLICATION—PREMATURE JUDGMENT BY DEFAULT.—In an action of unlawful detainer, where the service is made by publication of summons on the ground that defendant is concealing himself to avoid personal service, the service is not made until the publication is completed, and the defendant is allowed two full days thereafter in which to appear and answer. The entry of a judgment by default on the second day thereafter is premature, and will be reversed upon appeal.

12.—ACTION AND DUTY OF PLAINTIFF.—In taking a judgment by default the plaintiff acts at his peril. He must see that the law has been complied with, and that the time for appearance has expired.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Z. U. Dodge, for Appellant.

James P. Sweeney, for Respondent.

COOPER, J.—Unlawful detainer.

Judgment by default was entered against defendant, from which he appeals.

Summons was issued May 21, 1902, and on the same day the plaintiff filed an affidavit, stating that personal service could not be made for the reason that defendant could not be found, and was concealing himself to avoid service. The judge thereupon made an order directing that service be made by publication in a daily newspaper published in San Francisco, commencing with the twenty-first day of May, until and including the twenty-sixth day of May, 1902, and directing that the summons be returned on the twenty-sixth day of May, 1902, which was the return day named in the summons.

The summons was not served until the completion of the period of time prescribed for its publication,—that is, May 26, 1902. Judgment by default was entered May 28, 1902.

The code provides (Code Civ. Proc., sec. 1166) that the summons must be “returnable at a day designated therein, which shall not be less than three days, nor more than twelve days from its date, except in cases where the publication of the summons is necessary, in which case the court or a justice thereof, may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.”

It is further provided (sec. 1167) that the summons must be “served at least two days before the return day designated therein.”

In this case the summons was not served until the return day, that being the day when the publication was complete.

The law contemplates that the defendant in any case shall have two days after the summons is served in which to answer. "If, at the time appointed, the defendant do not appear and defend, the court must enter his default, and render judgment in favor of the plaintiff, as prayed for in the complaint." (Sec. 1169.) Defendant did not appear and defend at the time appointed, but he had not been served with the summons at said time. He was not served until the expiration of the last day of publication, May 26th. He was not then given two days to appear and answer or defend, for the judgment was entered and recorded May 28th.

In taking a judgment by default the plaintiff acts at his peril. He must see that the law has been complied with and that the time for appearance has expired. Otherwise he takes the chances of having his judgment set aside or reversed.

The judgment is reversed and the default set aside and the court below directed to allow defendant two days to appear or answer.

Harrison, P. J., and Hall, J., concurred.

[No. 49. Third Appellate District.—September 23, 1905.]

CITY OF MARYSVILLE, Appellant, v. COUNTY OF YUBA, Respondent.

MUNICIPAL CORPORATIONS—SPECIAL CHARTER REFERRING TO GENERAL LAWS—AMENDMENTS—FINES IN POLICE COURT UNDER STATE LAWS—PAYMENT TO COUNTY TREASURER.—The disposition of fines for misdemeanors imposed by a police judge under the state law in a municipal corporation chartered by special act prior to the constitution of 1879, and charter of which referred to the general law for its powers and duties, is not to be determined merely by the general law as it then stood, but is to be governed by existing amendments to such general law, providing that all such fines shall be paid to the county treasurer.

10.—POWER OF LEGISLATURE—GENERAL LAWS AFFECTING MUNICIPAL CORPORATIONS.—The legislature may pass general laws affecting municipal corporations, without reference to whether such corporations were formed before or after the constitution of 1879.

ID.—CONSTRUCTION OF CONSTITUTION—“MUNICIPAL AFFAIR.”—The disposition of fines for misdemeanors punished by virtue of the state law, and not of any municipal ordinance, is not a “municipal affair” under a special charter which says nothing about fines, and leaves their disposition to be regulated by the Penal Code.

APPEAL from a judgment of the Superior Court of Yuba County. K. S. Mahon, Judge presiding.

The facts are stated in the opinion of the court.

Arthur H. Redington, City Attorney, for Appellant.

M. T. Brittan, District Attorney, for Respondent.

CHIPMAN, P. J.—Action to recover back certain moneys collected on fines imposed by the police judge of the police court of plaintiff and alleged to have been paid over to defendant for the use and benefit of plaintiff.

Defendant demurred to the complaint for insufficiency of facts, and the court sustained the demurrer on this ground alone. Other grounds are stated in the demurrer, but as they are not mentioned in respondent’s brief, they will not be noticed. Plaintiff failing to amend its complaint, judgment passed for defendant and plaintiff appeals.

It was alleged in the complaint that there existed in plaintiff city a police court presided over by a police judge who had exclusive jurisdiction over municipal misdemeanors committed within the corporate limits of the city; and that he had jurisdiction, concurrently with the justice of the peace, over such offenses under state laws as were within the jurisdiction of the justice court for the judicial township of which the city formed a part. There are two counts in the complaint:—

1. To recover certain fines imposed upon and collected from persons adjudged guilty of certain state misdemeanors, which said fines had been paid over to the county treasurer on the assumption that they belonged to the county;

2. To recover certain moneys in cases where fines had been imposed for state misdemeanors and the convicted persons had elected to serve imprisonment in lieu of paying the imposed fine, but afterwards elected to pay the remaining unpaid portion of said fines, and did so pay the same to the

county treasurer through the hands of the sheriff of said county.

Claims were duly presented by plaintiff to defendant through the board of supervisors for the amounts thus coming into defendant's possession, and were rejected, and in due time this action was commenced.

The city of Marysville was first incorporated by act of March 3, 1857 (Stats. 1857, p. 40). It was reincorporated by act of March 7, 1876, (Stats. 1875-1876, p. 149,) "with the powers and under the provisions of title three of the Political Code of this state," (part IV, presumably, though not so expressed in section 1 of the act. See Pol. Code, sec. 4354 et seq.; *Ex parte Mauch*, 134 Cal. 500, [66 Pac. 734].) Appellant claims under the provisions of section 13 of the act of 1876, *supra*, which is as follows: "The police judge shall exercise all the powers granted him by the Political Code, except the provision of section 4425 [relating to the appointment of a clerk]. All moneys collected by him as such police judge shall be paid into the general fund of said city, on the first Monday of each month. He shall receive for such services an annual salary of five hundred dollars. . . ." The Penal Code, section 1457, as it stood when Marysville was reincorporated, read as follows: "Upon payment of the fine, the officer must discharge the defendant if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the county or city treasurer, according as the offense is prosecuted in a justice's or police court. If the fine is imposed, and paid before commitment it must be applied as provided in this section." The disposition of fines is further provided for as follows: "All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed, or the forfeiture is incurred, and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held." (Section 1570.) Both of these sections were amended in 1901. Section 1457 was amended by adding "provided that all forfeitures and fines collected for the violation of any city ordinance, whether in the police court or justices' court, shall be paid over to the city treasurer of the city in which such

ordinance is in force." Section 1570 was amended to read: "All fines or forfeitures collected in any court [omitting the exception as to police courts in the original section] must be paid to the county treasurer . . . ; provided, that all fines and forfeitures collected in any court for the violation of any city ordinance shall be paid to the city treasurer in which such ordinance is in force." (Stats. 1901, p. 88.)

In effect these amended sections require all fines collected in any court (less the costs incurred), except fines for the violation of city ordinances, to be paid to the county treasurer. Appellant concedes that these sections affect the police courts established in cities and towns chartered under the general Municipal Incorporation Law of this state (Stats. 1883, p. 93), and those existing in cities which owe their corporate powers to freeholders' charters provided by the constitution. But appellant contends that municipalities which were incorporated under special acts of the legislature before the new constitution went into effect, and which have never elected to incorporate under the general Municipal Incorporation Law, are not bound by these sections of the general law found in the Penal Code, "where direct provision governing the same subject-matter is to be found in the charter itself."

We must, by the terms of the act of reincorporation of plaintiff, look to the Political Code to ascertain the powers of the police judge. Section 4424 et seq. of that code define the criminal jurisdiction of the police court. Section 4431 also provides as follows: "Proceedings in criminal actions, triable in such courts [police courts] are regulated in part II, title XI, chapter I of the Penal Code." It is in this part, title, and chapter of the Penal Code that we find the sections 1457 and 1570, *supra*, relating to the disposition of fines and forfeitures. To determine the powers of the municipality and of its officers, we must look to the provisions of the Political Code and Penal Code, so far as these provisions have, by the charter itself, been made applicable. Appellant contends for the principle that express provisions of the charter, enacted by special legislative act, cannot be changed by the enactment of general laws. (Citing Smith's Beach on Municipal Corporations, secs. 101, 104, 105; Cooley's Constitutional Limita-

tions, 183.) The principle was applied in *People v. Hill*, 125 Cal. 16, [57 Pac. 669], where it was said of the charter of Salinas City there involved: "The charter being the law for a special case is not in conflict with a general law which provides otherwise. Even a general law subsequently passed, does not repeal laws expressly made for special cases, unless an intent that the general law shall have such effect is manifested in some mode in the general law." Assuming that the "moneys collected" by the police judge, mentioned in section 13 of the act of 1876, mean fines and forfeitures, they nevertheless come into his hands by virtue of the provisions of the general law. This general law (the Political Code and the Penal Code) cannot be restricted to its provisions as they stood when referred to by the charter, but must be held to be the provisions as defined from time to time by the legislature.

Surely the legislature could amend or repeal these provisions; and, when amended or repealed they would, we think, control the charter provisions on the same subject, for to no others could the charter then refer. The powers of the police judge to try cases and impose fines come alone from this general law, and it is sufficiently clear that when the legislature made the general law, in effect a part of the charter, it retained its power over the general law to amend or repeal it, and when it did the one or the other it became the law, and the only law, to which section 13 of plaintiff's charter could refer. The charter, by its reference to the Political Code (see sec. 4431 of that code), provided that proceedings in criminal actions triable in police courts, shall be regulated by the provisions of the Penal Code. The disposition of fines is part of such proceedings and may be regulated the same as may the jurisdiction of the police judge be regulated. In giving the police court jurisdiction over what are termed state misdemeanors, that officer is exercising the functions of justice of the peace, who is a county officer, and should be, and, we think, is subject, in the exercise of this jurisdiction, to the general law so far as applicable to his duties while acting in such capacity. He imposes fines in these cases alone through the authority given him by the general law as he finds it and not otherwise. The effect of the amendments to the Penal

Code, upon the disposition of fines and forfeitures, is not brought about by the amendment of some general law independent of the charter, but by an amendment to a general law which by the terms of the charter had been made applicable to it.

The legislature may pass general laws affecting municipal corporations without reference to whether such corporations were formed before or after the constitution of 1879. (See cases in notes to section 6 of article XI of Treadwell's Annotated Constitution of California; also, *Ex parte Braun*, 141 Cal. 204, [74 Pac. 780].)

It is claimed, however, that the amendment of the constitution of 1896 has taken away from the legislature the power to interfere in "municipal affairs," and that this matter of the disposition of fines is a municipal affair. We do not so regard it. If the charter clearly made these fines a part of the revenue of the city, by which, in part, the city was to derive its support, there might be some force in the suggestion. But the charter says nothing about fines; it is in the Penal Code alone we find the mode pointed out for their disposition. The police judge, in imposing fines for violations of state laws, is enforcing the general law as he finds it, and is performing the duties of a justice of the peace concurrently with that officer. Both officers are equally within the regulating power of the legislature in the trials of offenses punishable by state law, and such trials cannot be said to be "municipal affairs" as contemplated by the constitution. It would be vain to attempt to extract from the decisions of the supreme court a definition of these terms alike applicable to all cases. It seems to be conceded that the court has not undertaken and probably never will undertake to give a general definition of these words, but that their meaning must be determined in each individual case as it arises, and upon its own facts. Probably the cases of *Fragley v. Phelan*, 126 Cal. 383, [58 Pac. 923], and *Ex parte Braun*, 141 Cal. 204, [74 Pac. 780], throw as much light on the question as any of the decided cases.

The judgment is affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 67. Third Appellate District.—September 23, 1905.]

A. ALPER et al., Appellants, v. PATRICK TORMEY et al., Respondents; L. C. WITTENMYER, as Assignee of Union Stock Yard Company, an Insolvent Debtor, Intervener, Respondent.

SALE OF STOCK-YARD BY ASSIGNEE OF INSOLVENT—DISPUTE AS TO FIXTURES—COMPROMISE—CONVEYANCE—RECITALS—STEEL RAILS NOT INCLUDED.—Where the assignee of an insolvent corporation sold its stock-yard with all buildings, structures, tracks, and appurtenances, and where, upon a dispute as to whether certain articles were "personal property not sold," or were "fixtures," a compromise was allowed pursuant to a stipulation referring it to the court, which permitted an admission in the conveyance that all property in and about the premises shall pass as fixtures with the realty; *held*, that a conveyance reciting a sale of "all property used in connection with" the stock-yard company, and an agreement that all "personal property in and about the buildings is to be considered as fixtures," did not pass sixty tons of steel rails not on the premises, and far removed from any buildings or tracks, of the existence of which the assignee was ignorant, and which were not included in the stipulation referring the dispute, and were listed for taxation by the vendee as "old iron."

APPEAL from an order of the Superior Court of Contra Costa County denying a new trial. William S. Wells, Judge

The facts are stated in the opinion of the court.

Louis H. Brownstone, for Appellants.

W. S. Tinning, for Intervener, Respondent.

R. H. Latimer, for Patrick Tormey, Respondent.

McLAUGHLIN, J.—This is an action to recover sixty tons of steel rails. At the time the action was commenced the property in controversy was in the possession of defendant Tormey, but at the trial he expressly disclaimed all interest in the rails. Subsequent to the commencement of the action defendant Wittenmyer, as assignee of the Union Stock Yard Company, an insolvent debtor, filed his complaint in intervention and set up his claim to the possession and ownership of

said rails as such assignee. Judgment was entered in favor of the intervener, and plaintiffs appeal from an order denying their motion for a new trial. Appellants contend that the evidence is insufficient to sustain the findings, and the question thus presented, boiled down to its essence, involves the ownership of the rails here in controversy. It is admitted that the rails were owned by the insolvent corporation, and passed to the intervener by virtue of the assignment to him. But it is claimed that they were included in a sale of certain property of such corporation made by the assignee to plaintiff Alper. At the time the action was commenced, the rails were lying upon land owned by defendant Tormey. They had been brought there and, as he put it, "stored" on the land with his consent. The Union Stock Yard Company owned a plant which covered about thirty-five acres, and in connection therewith operated spur tracks which passed over Tormey's land. These rails were not laid, but were lying on the ground about fifty feet from such tracks, at a point about three hundred feet from the line of the Union Stock Yard Company's property. The undisputed facts touching the sale out of which this litigation arose may be briefly stated as follows:—

On November 12, 1900, the intervener, as assignee, sold to plaintiff Alper, all the right, title, and interest of said insolvent, and said assignee in and to certain blocks of land in Rodeo, Contra Costa County, "together with all the buildings, machinery, and fittings, corrals, pens, sheds, and appurtenances now erected or in process of erection upon said blocks, and all and every the railroad tracks and railroad superstructures, which have heretofore been built by the Union Stock Yard Company of San Francisco, . . . and used or intended to be used in connection with the improvements and machinery in said blocks." This sale was confirmed by the court, but disputes arose touching the payment of taxes, and "whether certain property in and upon the above-described premises and used in connection with the business formerly carried on there was *personal property not sold at said sale*," or "fixtures passing with the freehold, said property consisting among other things of two safes, tools and traveling hooks." On December 19, 1900, the parties entered into a stipulation embodying the foregoing facts, and reciting that

the matters in controversy should be submitted to the court for consideration. Two days later the assignee filed a petition for leave to compromise such disputes, and on December 22d the court made its order authorizing a compromise pursuant to the terms of the stipulation, and the delivery of a conveyance of the assignee's interest in the real property sold, with an admission that "all of the property *in and about said premises* shall pass as fixtures with said realty." Thereupon said intervener executed and delivered to Alper an instrument reciting that intervener had sold all of his right, title, and interest in and to "*all property* used in connection with the Union Stock Yard Company of San Francisco unto A. Alper, and has agreed that all property which might possibly be considered under the circumstances as personal property *in and about the buildings* is to be considered as fixtures, and as passing with the real property." It is admitted that at the time of the sale and compromise, the assignee did not know of the existence of the rails in controversy. It is also conceded that plaintiffs jointly own the property acquired by virtue of such sale.

It is clear from the foregoing statement, that the rails did not pass to plaintiffs. It cannot be pretended that anything more than real property, and that which ordinarily passes with real property, was included in the sale originally, nor can it be said that all personal property passed by virtue of the compromise.

The stipulation entered into by the parties shows on its face that such was not the fact. The dispute which led to the compromise, as far as such dispute is germane to the problem before us, involved only the question whether certain property in and about the premises was personal property "*not sold at said sale*," or was to be considered as "fixtures passing with the freehold." If all of the personal property had been included in the sale it is difficult to imagine how a dispute as to the "fixtures" could be possible. If such was the understanding, it is equally difficult to guess why "personal property not sold at said sale" was mentioned in the stipulation upon which the compromise was based.

Great stress is placed upon the words "all property," contained in the instrument executed by the assignee pursuant to the order authorizing the compromise. It is said that this

language is comprehensive enough to include all of the personal property. Waiving the proposition that the compromise could not be made broader than the authorization, the words relied upon must be construed in the light of surrounding facts and circumstances. So construed it is clear that such words could only refer to the real property, and to personalty in and about the buildings, which was to be considered as included in the term "fixtures." These rails were not even on the land. They were fifty feet from any of the spur tracks used by the insolvent, and far removed from any of the buildings. The argument as to the *intent* of the parties is far from convincing. We cannot understand how the assignee could have intended to include specific personal property, worth at least two thousand dollars, when he was ignorant of the existence of such property. Nor can we understand how such intent could exist, when such property was not mentioned during the dispute nor in the stipulation. It is evident that the plaintiffs did not class the rails as "fixtures," for the following year, at their request, such property was assessed as personal property under the designation of "old iron."

The order is affirmed.

Buckles, J., and Chipman, P. J., concurred.

[No. 62. First Appellate District.—September 23, 1905.]

H. W. KNOLL, Appellant, v. DRURY MELONE, Respondent.

CONTRACT TO COLLECT CITY BONDS—HALF INTEREST OF ATTORNEY—SALE OF OWNER'S INTEREST IN JUDGMENT—SECOND ASSIGNMENT AS COLLATERAL—CONDITIONAL PROMISE OF ATTORNEY.—Where the owner of city bonds contracted with an attorney to collect them for a one-half interest, and absolutely sold and assigned all his interest in the judgment rendered in payment of a canceled note, but subsequently assumed to assign his interest in the original contract as collateral security for his note to a third person, and directed the attorney to pay the note out of any money which may be due him under the contract: *Held*, that a conditional promise by

the attorney that, should any money come into his hands payable to the maker of the note, he would out of such funds pay the note, does not render the attorney liable by its terms, as no money coming into his hands could be so payable.

1D.—OWNERSHIP OF COLLATERAL—LIEN—RIGHTS OF PLEDGOR.—An assignment by way of collateral security for the payment of a note creates only a lien, and confers no title, which remains in the pledgor, who may at any time extinguish all rights under the assignment by simply paying the note.

1D.—PRIOR NOTICE OF SECOND ASSIGNMENT—NOTE BARRED BY STATUTE—EXTINGUISHMENT OF LIEN—RIGHTS OF PRIOR ASSIGNEE.—The fact that no notice was given to the attorney of the prior assignment of the owner's half interest in the judgment before prior notice had been given of the assignor's assignment of the original contract (which had become merged in the judgment) by way of collateral security, is not material, where it appears that, long before any money was collected, the lien in favor of the payees of the note became extinguished by the lapse of time in which an action could be brought on the note, and that the prior assignee of the judgment, as a purchaser thereof for value, became absolutely entitled to any money that might be collected on the judgment under the interest of the assignor, discharged of any lien in favor of such payees.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Beatty & Sanderson, for Appellant.

Franklin P. Bull, and L. A. Wittenmyer, for Respondent.

HALL, J.—This is an appeal by plaintiff from a judgment in favor of defendant upon the judgment-roll alone. The facts that determine this case, as set forth in the findings, are as follows:—

On the twenty-third day of April, 1881, J. R. Myers was the owner of certain bonds and coupons of the city of Placer-ville of the face value of \$29,500, and by writing under said date entered into a contract with Drury Melone (defendant) whereby Melone undertook to collect from said city said bonds and interest thereon. By the terms of said contract Melone should have, own, and retain one half of whatever should be

recovered on said bonds or coupons by litigation, settlement, or compromise.

May 10, 1882, said Myers, by a writing placed at the foot of said written contract between Myers and Melone, assigned to L. L. Robinson all the interest of Myers in said contract and in said bonds and coupons as security for the sum of four thousand dollars due by Myers to Robinson, and evidenced by promissory note of date May 10, 1882, and bearing interest.

June 30, 1885, Myers executed to Robinson a renewal note for the principal and interest, then amounting to fifty-eight hundred dollars, to bear interest at ten per cent per annum, and payable one day after date, and as collateral security therefor again assigned to Robinson all the interest of Myers in said contract with Melone and in said bonds and coupons. Robinson did not give notice to Melone of said assignments, and Melone had no knowledge thereof on or before March 5, 1887.

October 6, 1886, judgment was entered in the superior court of the city and county of San Francisco in favor of Myers and Melone against the city of Placerville for the amount due upon said bonds and coupons.

On September 1, 1887, Myers, by a writing, made an absolute assignment of his one-half interest in said judgment to Robinson in payment of the note for fifty-eight hundred dollars, nothing having been paid thereon, and said note was canceled, and Robinson released Myers from all claims and demands, and thereafter said Robinson always claimed to be the absolute owner of said one half of said judgment.

That on the first day of February, 1887, said Myers was indebted to Davis & Son in the sum of three hundred dollars, and on said date executed to Davis & Son a promissory note, payable on demand, for three hundred dollars, and interest at one per cent per month, and as security for the payment of the sum assigned all his interest in said bonds and said contract with Melone to Davis & Son, and executed and delivered to Davis & Son the following writing:—

“OAKLAND, CAL., Feb. 1st, 1887.

“I hereby pledge and assign to said George A. I. Davis, as security for and of the above note all my interest in the contract between me and Drury Melone, relating to the bonds and coupons of the City of Placerville, and interest thereon.

I hereby direct the said Melone to pay the above note out of any money which may be due me at any time under or by virtue of said contract.

J. R. MYERS."

Melone was notified of said assignment March 5, 1887, and referring to said order signed the following:—

"The within orders were presented this 5th day of March 1887, and should money come into my hands payable to J. R. Myers or his wife I will out of such funds pay the above note.

DEUBY MELONE."

(Mrs. Myers never had any interest in the matter.)

Robinson died in 1892, and Sophia G. Cutter was appointed executrix of his will, and on the fourth day of October, 1899, Melone, upon a compromise (consented to by said Cutter), collected from the city of Placerville in full satisfaction of said bonds \$30,910.

The note to Davis & Son had never been paid, and plaintiff is now the owner thereof by proper assignment.

In response to a plea of the statute of limitations made by the defendant the court found that said promissory note to Davis & Son is barred by the provisions of section 337 of the Code of Civil Procedure, but the action upon the writing signed by Melone, March 5, 1887, is not barred.

The court further found and decided that Melone never collected or received any money payable to J. R. Myers, but that the money collected under said compromise was one half for Melone and one half for the executrix of Robinson's will, and gave judgment for defendant for his costs.

The judgment rendered by the trial court is correct.

The only promise to pay ever made by Melone is contained in the writing of date March 5, 1887, and was conditional. It is in these words: "The within orders were presented this 5th day of March, 1887, and should money come into my hands payable to J. R. Myers or his wife I will out of such funds pay the above note."

No money ever did come into Melone's hands payable to Myers. The condition upon which Melone promised to pay the Davis note has never arisen. Long before any money was collected Myers had by an absolute assignment of the judgment which had been recovered on the bonds, parted with

all claim to any interest in the bonds, and consequently none of the money collected was payable to him. Melone did not promise to pay out of such money as he might collect on the bonds, but only out of such money as should be payable to Myers.

His promise cannot be extended beyond the plain meaning of the words used by him. Indeed, if we understand the contention of appellant, he does not rely so much upon this conditional promise of Melone's, but rather upon the effect of the assignment of the bonds to Davis & Son, February 1, 1887, and the fact that they notified Melone of such assignment before Melone received any notice of Robinson's assignments.

Counsel states his position in the form of a supposititious dialogue between his client and Melone, and puts these words into the mouth of his client: "Robinson bought out Myers September 1, 1887, six months after my assignment. As for the lien he had on the fund when I gave my notice, it yielded to me because of that notice. As against his prior *right* you must pay me because of my prior *notice*. As against his subsequent purchase I am protected by my prior *assignment and notice*." (Italics are ours.)

In support of his position appellant has discussed the law as to the relative rights of successive assignees of a chose in action as depending on the order in which they give notice to the debtor or trustee of the fund, as the case may be, and especially relies on *Graham Paper Co. v. Pembroke*, 124 Cal. 117, [71 Am. St. Rep. 26, and note, 56 Pac. 627].

With the doctrine of this latter case we have no quarrel, but it has no application to the facts of this case.

What were the rights secured by Davis & Son under the assignment of February 1, 1887? The assignment was as *security* for the payment of the promissory note, and by such assignment they did not become the owner of any interest in the bonds or in the contract with Melone, or in the potential fund that might result from the bonds. Myers still remained the owner of the bonds, and Davis & Son as between him and them had a lien thereon as security for the payment of the note. It is perfectly plain that Myers could have extinguished all right Davis & Son had under the assignment and order by simply paying the note.

The principle above stated is amply supported by *Bibend v. Liverpool etc. Ins. Co.*, 30 Cal. 19, cited by appellant.

In this latter case Wallstein and Mears gave notes to Wegener & Shoenbar for an indebtedness they owed the latter firm, and agreed that Wegener & Shoenbar should hold certain insurance policies as collateral security with the right to collect the insurance in case of loss, and apply the amount on the debt. Subsequently Wegener & Shoenbar assigned the notes and policies to Bibend. A loss by fire occurred; suit was brought, and the court, in discussing the effect of the assignment of the policies, said: "The insurance in this case was effected in the names of Wallstein and Mears, upon their property, and the premiums were paid by them. At the time of the fire the property belonged to them, and so did the policies of insurance. At that time the plaintiff held the policies, not as the owner of them by title absolute, but as evidence of his right under the contract entered into between the firms mentioned to receive of the insurance companies the money due Wallstein & Mears by reason of the loss by fire, and to appropriate sufficient of it to the payment of the amount due on the notes assigned to him by Wegener & Shoenbar.

"The subject to which the contract of these firms had reference was the money which might become due from the insurance companies in case of a loss of the property by fire. The effect of the contract was not to transfer the title and property of Wallstein & Mears in the policies. They had the power at any time to possess themselves of the policies by paying the amount due to Wegener & Shoenbar. . . . At that time the plaintiff had no more than an equitable lien on the fund created by the concurrence of the loss and the liability of the insurers to pay."

Davis & Son having acquired, by the assignment to them of February 1, 1887, as security for the demand note of same date, no absolute title either to the bonds, contract, or the fund to be derived from the bonds, but simply a lien thereon for the payment of such note, the next question is: What has become of that lien? The answer is: It has long since been extinguished by lapse of time.

Upon the face of the complaint (and the finding of the court accords therewith) the note to Davis & Son was barred

by the statute long before any money was collected by Melone on the bonds.

"A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." (Civ. Code, sec. 2911; *Newhall v. Sherman, Clay & Co.*, 124 Cal 509, [57 Pac. 387], and cases there cited; and also *Conway v. Supreme Council*, 131 Cal. 437, [53 Pac. 727], and 137 Cal. 384, [70 Pac. 223],—two appeals.)

If Myers had not made an absolute assignment of his interest in the bonds to Robinson, and an action had been brought against Myers by Davis & Son to foreclose their lien on the bonds for the payment of the note, at any time subsequent to February 1, 1891, Myers could have successfully pleaded the bar of the statute. The right of action on the note being barred, the right to enforce the lien on the bonds or the proceeds thereof is also barred.

Robinson for value purchased the judgment, into which the bonds had merged, September 1, 1887, and as soon as the statute had run against the note from Myers to Davis & Son he was entitled to all the money that might be collected thereon under the Myers interest, discharged of any lien in favor of Davis & Son.

The judgment is affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 68. First Appellate District.—September 23, 1905.]

J. M. CUSICK, Respondent, v. ELIZABETH BOYNE,
Appellant.

ASSUMPSIT FOR LEGAL SERVICES—SUFFICIENCY OF COMPLAINT—IMPLIED PROMISE—AYERMENT NOT REQUIRED.—A complaint in *assumpsit* for legal services which alleges that the legal services were performed at the special instance and request of the defendant, and states what they were reasonably worth, is not demurrable for not alleging that defendant promised to pay what the services were reasonably worth. It is never necessary to allege a promise where the law implies one.

RE—SERVICES OF ATTORNEY—ABSENCE OF AGREEMENT AS TO PAYMENT—RECOVERY OF REASONABLE VALUE.—When an attorney per-

forms services for another, at his instance and request, nothing being said as to payment, the attorney is entitled to recover the reasonable value of his services.

ID.—EVIDENCE—VALUE OF SERVICES—LITIGATION—SECURING LIFE ESTATE—MONTHLY RENTAL—MORTALITY TABLE—EXPECTANCY OF LIFE.

—It is always competent in a controversy as to the value of legal services, to prove the nature of the litigation and the amount involved; and where it is shown that, as the result of the litigation, a life estate was secured, evidence is admissible to show its monthly rental, and to show by the tables of mortality the average expectancy of life of a person of the age of the defendant at the time when the litigation was terminated, as a circumstance tending to show the value of the legal services.

ID.—PRESUMPTION OF AVERAGE HEALTH AND STRENGTH—BURDEN OF PROOF.

—The defendant is presumed to be of the average condition of health and strength of other persons of the same age, and the plaintiff was not required in the first instance to prove that fact, before proving the tables of mortality; but if for any reason the health of defendant was such that she would be taken out of the general rule, it was incumbent upon her to prove it.

ID.—STATED ACCOUNT—PROPER INSTRUCTION—HYPOTHETICAL STATEMENT OF FACTS.

—Where there was evidence in the case tending to support it, the court properly instructed the jury that if they should find from the evidence that a statement of account was remitted by plaintiff to the defendant at time stated, and that its items were then fully explained by plaintiff, and that more than three months elapsed without any objection being made by the defendant, the account became an account stated, the items of which were no longer open to inquiry in the absence of allegation and proof of fraud or mistake. Such instruction is not on any matter of fact, but properly submits a hypothetical statement of facts, upon which the law is stated as applicable thereto.

ID.—SPECIAL CONTRACT—MATTER OF DEFENSE—INSTRUCTIONS AS TO BURDEN OF PROOF.

—Where the defendant pleaded a special contract that if plaintiff was successful in the action he was to be paid what his services were reasonably worth, but if he failed he was to make no charge and receive no compensation, the court properly instructed the jury that the burden was on the defendant to prove the special contract alleged, and that unless she established it by a preponderance of evidence, her defense founded upon such special contract would fail entirely. If the evidence were evenly balanced as to such special agreement, it would not take the case out of the rule that valuable services performed for defendant by plaintiff at defendant's request must ordinarily be paid for.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

Charles G. Nagle, for Appellant.

R. Percy Wright, for Respondent.

COOPER, J.—This action was brought for legal services rendered by plaintiff's assignor, as attorney at law, for defendant, at her special instance and request, between the second day of January and the twelfth day of September, 1901.

The case was tried with a jury, and a verdict rendered for plaintiff in the sum of nine hundred dollars.

Defendant made a motion for a new trial, which was denied, and she brings this appeal from the judgment and order denying her motion.

There is sufficient evidence to sustain the verdict, and no question is made in that regard. Defendant urges certain alleged errors which occurred during the trial, of which we will notice those deemed most plausible.

The complaint alleges that the legal services were performed at the special instance and request of defendant, and that such services were reasonably worth the sum of one thousand dollars. It is claimed that the defendant's demurrer to the complaint should have been sustained because there is no allegation that defendant agreed to pay what the services were reasonably worth. If defendant's contention is correct, it would introduce a new departure from the long-settled rules of pleading. It is never necessary to allege a promise where the law implies one. To illustrate, suppose the defendant made no promise, as such, but went to the attorney and asked him to perform services for her, and he did so at her request; that such services were of the reasonable value of one thousand dollars; is the attorney without a remedy because appellant did not say, "I will pay you"?

In all cases where one performs services for another at his instance and request the law implies a promise to pay.

When an attorney performs services for another at his instance and request, nothing being said as to payment, the attorney is entitled to recover the reasonable value of his services.

As a circumstance tending to show the value of the services, plaintiff proved the value of the real estate in controversy in the matter concerning which the attorney was employed, the monthly rental thereof, and that a life estate was secured to appellant, by way of compromise, as the result of the legal services. It is always competent, in a controversy as to the value of legal services, to prove the nature of the litigation and the amount involved. Plaintiff, under the objection of defendant, was allowed to prove by the witness Stearns, with the aid of the tables of mortality in use in the United States, the average expectancy of life of a person sixty years of age, that being the age of defendant at the time the litigation was terminated. The objection was that the plaintiff did not first prove that defendant was in a sound condition of health. The objection is without merit. The witness testified that the mortality tables are based on the average life of all persons at given ages without regard to the condition of their health. The law presumes that a person of sixty years of age is in the average condition of health and strength of other persons of that age. If for any reason the health of defendant was such that she would be taken out of the general rule, it was incumbent upon her to prove it; and besides, the matter was not vital, and was only in regard to a circumstance or fact tending to show the value of the legal services.

The court instructed the jury in substance that if they should find from the evidence that a statement of account was rendered to defendant on September 12, 1901, and that the items thereof were explained to her, and that more than three months elapsed after said date without any objection being made by the defendant, the account became an account stated the items of which were no longer open to inquiry in the absence of allegation and proof of fraud or mistake. It is not claimed that there was no evidence upon which to predicate the instruction, nor that the proposition of law therein stated is not correct, but that the instruction violates the constitution as being a charge in respect to a matter of fact. We do not think that the instruction contains a charge as to a matter of fact. The facts were left to the jury, the court merely telling them that if they found certain facts, the law was as stated. It has always been the practice for trial courts in this state to submit a certain hypothetical statement of

fact, concerning which there is a conflict, to the jury, and tell them that if they find the facts as stated, the law is as stated by the court when applied to such facts.

For example, in actions for malicious prosecution, the court, in charging the jury, will tell them that if they find certain facts, such facts do or do not amount to probable cause, as the case may be. The court in the instruction complained of did not even intimate that the evidence sustained any fact or proposition, but left it to the jury to find from the evidence as to the facts.

Defendant, as a defense to the action, alleged in her answer a special contract, to the effect that the attorney, at the time of his employment, agreed that if he was successful in the said action he was to be paid what his services were reasonably worth, but if he failed in said action he was to make no charge and receive no compensation for his services. The court instructed the jury, "that the burden of proving that there was such a special contract rests upon the defendant Elizabeth Boyne, and unless she establishes it by a preponderance of evidence, her defense founded upon such special contract fails entirely."

The portion of the instruction quoted is complained of as not being a correct proposition of law. The court had elsewhere instructed the jury that the plaintiff must make out her case by a preponderance of evidence. Therefore the instruction applied to the special contract alleged. If an agreement was made that under certain circumstances no charge was to be made for services, the burden was upon defendant to prove it. In other words, the plaintiff, having proved that the services were performed at the request of the defendant, and the reasonable value thereof, would be entitled to recover; but, defendant says, an agreement was made taking the case out of the ordinary rule. The court merely said the burden was upon defendant to prove such special agreement. The burden certainly was not upon plaintiff to prove it. It was no part of plaintiff's case. If the evidence were evenly balanced as to such special agreement, it would not take the case out of the rule that valuable services performed for another at her request must ordinarily be paid for.

It is sufficient, as to other instructions complained of, to say that we have examined them and find no error that would

justify a reversal of the case. The parties were before the trial court with a jury. The trial seems to have been fair, and the law carefully stated in the instruction of the learned judge. The decision as to facts on conflicting testimony is final here.

The judgment and order are affirmed.

Harrison, P. J., and Hall, J., concurred.

[No. 61. Third Appellate District.—September 26, 1905.]

D. O. CASTLE, Respondent, v. WALTER F. SIBLEY, Sheriff, etc., and GEORGE E. CRANE, Appellants.

SALE OF HAY—PURCHASE BY OWNER OF LAND FROM CROPPER—DELIVERY AND CHANGE OF POSSESSION—ATTACHMENT—SUPPORT OF FINDINGS.
—In an action involving the title to hay sold by a cropper to the owner of the land, and the validity of an attachment against the cropper, where the court found in favor of the plaintiff, and that there was an actual delivery and continuous change of possession prior to the attachment, all conflict in the evidence must be resolved in favor of the action of the trial court, and the findings are sufficiently supported by evidence tending to show that aside from plaintiff's interest in the hay as owner of the land, he in good faith purchased the cropper's interest for full value, and that after the sale the hay was under his exclusive dominion and control by his own agent on the land.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. W. B. Nutter, Judge.

The facts are stated in the opinion of the court.

R. C. Minor, and W. A. Washington, for Appellants.

Nicol & Orr, for Respondent.

McLAUGHLIN, J.—This is an action to recover a sum of money held by the defendant sheriff in lieu of certain hay attached by him in a suit brought by defendant Crane

against Hayes Nicewonger and others. The plaintiff had judgment, and from such judgment, and an order denying their motion for a new trial defendants appeal. The pivotal question argued in the briefs, and upon which the determination of this appeal depends, is whether a sale of the hay levied upon, made by Hayes Nicewonger to plaintiff, prior to such levy, was accompanied by an immediate delivery, and followed by an actual and continuous change of possession as required by section 3440 of the Civil Code. The findings in this regard are assailed as not supported by the evidence, and a brief summary of such evidence will suffice to indicate the points upon which such contention is based. It appears that plaintiff owns the land upon which the hay in question was produced, and that Hayes Nicewonger, his brother-in-law, occupied the same from October 1, 1902, to September 30, 1903, under a contract whereby Nicewonger was to farm the land and yield to plaintiff one third of the crop produced. During the term of Nicewonger's occupancy of the land he maintained a residence in Stockton, and came home nearly every night, returning to the ranch in the morning. After the termination of the contract above mentioned there was little if any apparent change in the manner of his general occupancy of the premises. At the time the hay was harvested he was indebted to the Farmers' Union and Milling Company, such indebtedness being secured by a mortgage on the crop produced on this land. The company was pressing this demand against him, and on September 23, 1903, pursuant to an understanding between Nicewonger, the plaintiff, and the officers of said company, plaintiff bought this hay and paid Nicewonger the full market value thereof, and the purchase price was applied to the payment of the above-mentioned indebtedness. There is not the slightest conflict as to the sale and payment of the purchase price, nor is there any evidence tending to show that such sale was fraudulent or designed to hinder or delay other creditors. Immediately after the sale was made, plaintiff instructed Cary Nicewonger to go out to the ranch and take charge and possession of such hay, and prepare to deliver it whenever and wherever directed to do so by plaintiff. Cary went out to the ranch and that evening went down to the place where the contractor baling the hay was at work, drove some hogs away from it, and was down there nearly every day thereafter. He pre-

pared teams to deliver the hay, kept it in sight all the time, and while he did not place any signs on stacks or bales, nor cause it to be immediately moved from its position on the land, there is evidence sufficient to sustain the conclusion that he had charge of it, and that it was delivered under his direction pursuant to orders from Castle. At the time of the sale the hay was stacked at different places on the land, there being about sixty or seventy tons in each stack. At that time but forty-four tons had been baled, and the contractor continued to bale the remainder, concluding his labors about September 30th. The total amount baled was one hundred and fifty-five tons. The contract for baling was made by Hayes Nicewonger before the sale, but after the sale the contractor was holding possession and claiming a lien on the hay, and plaintiff paid his demand in full. After the sale Castle made repeated efforts to sell the hay, and on September 29th he sold it to Rumenapf & Co., and instructed Cary to deliver it on board the cars at French Camp as speedily as possible. His directions were obeyed without delay, and on October 3d about five carloads, or sixty tons, had been so delivered. On that day, and while the hay was in course of delivery to Rumenapf & Co., defendant sheriff, by virtue of an attachment issued in the case of *George E. Crane v. Hayes Nicewonger et al.*, levied upon the hay remaining on the land, and out of such attachment this controversy arose. At the time of the first sale to plaintiff, his portion of the hay had not been separated from the general mass, nor delivered to him. After September 23d about five tons of the hay was delivered to one Fohls at Stockton by plaintiff's order, and on the day of the sale a load was placed in the barn of Hayes Nicewonger in that city. One employee of Hayes Nicewonger assisted in the delivery of the hay and Nicewonger's teams were used for the purpose, but there is nothing to show whether plaintiff compensated Nicewonger for such service. Hayes Nicewonger sometimes went to French Camp while the hay was in course of delivery, but there is positive testimony to the effect that each load was delivered under Cary Nicewonger's personal supervision. The defendants do not dispute plaintiff's right to the proceeds arising from the sale of hay actually delivered to Rumenapf & Co., and it was

stipulated that the remaining hay should be delivered to them, and that the purchase price of such remainder should be paid to the sheriff instead of plaintiff, and held by such sheriff pending the result of this action. Cary Nicewonger is the son of Hayes Nicewonger and the nephew of plaintiff. His residence was in the city of Stockton, where he had lived about thirty-two years. About September 10, 1903, he was in San Francisco, but came back to Stockton at plaintiff's request, and on the last-mentioned date went out to the ranch to care for plaintiff's stock and attend to other interests of plaintiff on this ranch. During his stay there he lived in the only dwelling on the premises, which dwelling was also occupied by his father. The evidence shows without conflict that he went out to the ranch on September 10th and remained there as the employee and servant of plaintiff, and that he did no work and performed no service whatever for his father. Evidence was introduced tending to contradict some statements made by plaintiff as a witness in the case, and it is said that his testimony is entitled to no weight. But the court cannot say that evidence clearly relevant and competent should have been rejected or accepted by the trial court in reaching a conclusion as to matters of fact. Under the well-settled rule conflicts in the evidence must be resolved in favor of the action of the trial court, and the only question here to be passed upon is whether there is sufficient evidence in the record to sustain the findings. We are of the opinion that this question must be answered in the affirmative. Aside from plaintiff's interest in the hay, and the fact that the purchase price was used to redeem the crop from the lien of the crop mortgage, he also redeemed it from the asserted lien of the contractor who baled the hay. But waiving these considerations, there is sufficient evidence to show that after the sale the hay was under his exclusive dominion and control, and under the authorities the findings cannot be disturbed. (*Feeley v. Boyd*, 143 Cal. 286, [76 Pac. 1029]; *Dubois v. Spinks*, 114 Cal. 292, [46 Pac. 95]; *Porter v. Bucher*, 98 Cal. 459, [33 Pac. 335]; *Byrnes v. Moore*, 93 Cal. 394, [29 Pac. 70]; *Claudius v. Aguirre*, 89 Cal. 503, [26 Pac. 1077]; *Hickey v. Coschina*, 133 Cal. 83, [65 Pac. 313].)

The briefs are entirely silent as to the many assignments of error contained in the bill of exceptions, and for this rea-

son we do not feel called upon to examine or consider such assignments.

The judgment and order are affirmed.

Chipman, P. J., and Buckles, J., concurred.

[No. 60. First Appellate District.—September 27, 1905.]

CITY AND COUNTY OF SAN FRANCISCO, Appellant,
v. DANIEL HARTNETT, and WILLIAM GIBBONS,
Respondents.

ACTION UPON UNAUTHORIZED BAIL-BOND—CHARGE OF CRIME IN POLICE COURT—BOND FIXED BY CLERK—SAN FRANCISCO CHARTER—PENAL CODE.—An action cannot be sustained upon a bail-bond given to secure the appearance of a person accused of the crime of grand larceny in the police court of the city and county of San Francisco, where the amount of the bond was fixed solely by the warrant and bond clerk of that court. There is no authority given to such clerk by the San Francisco charter to fix the amount of such a bond; and the Penal Code provides a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail must be made by a court or magistrate.

Id.—BOND ABSOLUTELY VOID.—Where the amount of a bail-bond in a criminal case has been fixed, or the bail-bond has been accepted or approved, by an officer not authorized by law so to do, the bail-bond is absolutely void, and cannot be sustained as a common-law bond.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. M. C. Sloss, Judge.

The facts are stated in the opinion of the court.

L. F. Byington, District Attorney, and I. Harris, Assistant District Attorney, for Appellant.

Sullivan & Sullivan, for Respondents.

HALL, J.—This is an appeal from a judgment in favor of defendants entered after failure of plaintiff to amend complaint upon order sustaining defendants' general demurrer to the complaint.

The action was brought against defendants as the sureties on a bail-bond given by them to secure the appearance of one Calnan, to answer to the charge of grand larceny in the police court of the city and county of San Francisco.

Respondent, the demurring party in the trial court, urges that the bond sued on is void for the reason (among others also urged) that, as appears by the allegations of the complaint, the amount of the bail was fixed by the assistant warrant and bond clerk, and not by order of a court or magistrate. Appellant contends that the charter of the city and county of San Francisco vests authority in the warrant and bond clerk to fix the amount of bail by persons charged with crime, and also that if this is not so, the bond in suit is nevertheless good as a common-law bond.

Passing the point made by respondent that a charter provision, vesting in the warrant and bond clerk the power to admit to bail, would be unconstitutional, as vesting judicial functions in a ministerial officer (upon which we express no opinion), we are unable to find anything in the charter that gives such clerk the power to fix the amount of bail to be given by persons charged with crime.

Appellant relies upon the provisions of sections 5 and 6 of chapter VIII of article V of the charter.

Section 5, after providing for the appointment of a warrant and bond clerk and three assistants, etc., provides as follows: "The warrant and bond clerk shall indorse upon the bond the time when it was issued by him or when it came into his possession. He may issue bail bonds and appeal bonds when the liability therefor does not exceed two thousand dollars (\$2,000.00), and order the discharge from custody of the prisoners for whom these bonds are issued; and he may take cash bail to the extent in any one case of one thousand (\$1,000.00) dollars. . . ."

Whatever the framers of the charter meant by the words "He may *issue* bail bonds and appeal bonds when the liability therefor does not exceed two thousand dollars," it is certain that they did not mean by such language to vest the clerk with the power to fix the amount of the bond. The limitation of the amount beyond which he may not "issue" bonds clearly indicates that the amount is to be fixed by some other authority. Otherwise he would have power to

admit to bail in all cases, for, by simply fixing the amount of bail at a sum not exceeding two thousand dollars, he would vest himself with authority to admit to bail in any case, no matter how aggravated or heinous the crime might be.

Section 6 of the same chapter and article contains this provision: "In the matter of fixing bail and ordering the release of prisoners the warrant and bond clerk shall be subject to the judges of the police court," etc.

We do not think that we are justified in holding that this language invests the warrant and bond clerk with authority to fix the amount of bail. It seems rather to have been inserted in the charter *ex industria* for the purpose of making it clear that such power lies with the judges of the police court.

The Penal Code provides a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail must be made by a court or magistrate. (Pen. Code, secs. 821, 823, 824, 1268, 1269, 1273, 1277.)

We therefore hold that the warrant and bond clerk has no power to fix the amount of bail to be given by persons charged with crime.

Appellant next urges that if it be held that the clerk had no authority to fix the amount of bail, yet the bond may be recovered on as a good common-law obligation.

Undoubtedly a bond is not rendered void by a mere irregularity, such as the failure of sureties to justify, it being held that the justification is no part of the bond, but a matter for the benefit of the obligee only, which he may of course waive.

Murdock v. Brooks, 38 Cal. 603, is a type of this class of cases. See, also, *People v. Shirley*, 18 Cal. 121; *People v. Penniman*, 37 Cal. 273; *Moffit v. Greenwalt*, 90 Cal. 371, [27 Pac. 296]; *Carpenter v. Furrey*, 128 Cal. 669, [61 Pac. 369]

The only states in which it has been held that a bail-bond given on the order of an officer not authorized to admit to bail is valid at all we believe to be Iowa and Georgia. (*State v. Canon*, 34 Iowa, 322; *Dennard v. State*, 2 Ga. 137; *Park v. State*, 4 Ga. 329; *Jones v. Gordon*, 82 Ga. 570, [9 S. E. 782].)

In the Iowa case no authorities are cited, and the matter is disposed of in a few sentences. In Georgia the ruling of

the court seems to be in part founded on a statute peculiar to that state, and the doctrine laid down in the Georgia cases has been discredited in other jurisdictions, and especially by Freeman in his note to *Harris v. Simpson*, 14 Am. Dec. 101.

On the other hand, it has been held that where the amount of the bail-bond has been fixed, or the bail-bond accepted and approved, by an officer not authorized by the law so to do, such bail-bond is entirely void, in the following states, viz: Kentucky, Oregon, Colorado, Massachusetts, Indiana, Texas, New Jersey, Maine, Nebraska, Ohio, Missouri, and other states. (*Commonwealth v. Roberts*, 1 Duvall, 199; *Williams v. Shelby*, 2 Or. 145; *Rupert v. People*, 20 Colo. 424, [38 Pac. 702]; *People v. Mellor*, 2 Colo. 705; *Haney v. People*, 12 Colo. 345, [21 Pac. 39]; *State v. Winninger*, 81 Ind. 51; *State v. Russell*, 24 Tex. 505; *State v. Kruse*, 32 N. J. L. 313; *State v. Young*, 56 Me. 219; *Dickenson v. State*, 20 Neb. 72, [29 N. W. 184]; *Harris v. Simpson*, 4 Litt. 165, [14 Am. Dec. 101]; *Powell v. State*, 15 Ohio, 579; *People v. Brown*, 23 Wend. 47; *Gouchman v. Lisle*, 15 Ky. L. R. 543.)

In *Williams v. Shelby*, 2 Or. 145, a justice without authority took the bail-bond, and the court said: "There was no statute in existence at the time of the proceeding authorizing the justice to take such a bond; therefore it must be treated as void. ([*Vose v. Deane*, 7 Mass. 280; *Commonwealth v. Otis*], 16 Mass. 199; [*Commonwealth v. Loveridge*], 11 Mass. 337; [*People v. Brown*], 23 Wend. 47). The circuit court held that although there was no statute then in existence authorizing the taking of this bond by the justice, yet it might be sustained and held valid as a common-law undertaking; that the discharge of the principal for the time being was a sufficient consideration to sustain the promise and agreement entered into. This holding we think cannot be sustained by the authorities; in fact, none have been produced to that effect. Authority has been cited to this effect, that another class of bonds might well be sustained from their form and structure without the aid of statute, such as injunction bonds, replevin bonds, bail-bonds in civil cases, forthcoming bonds, appeal bonds, and all such as are made payable to the beneficiary or interested party. Such have been held valid at common law, without resorting to the stat-

ute to give them effect, but it is held otherwise in criminal cases."

In *Rupert v. People*, 20 Colo. 424, [38 Pac. 702], the Oregon case just referred to is cited, and the court said: "The recognizance, therefore, having been taken and approved by an officer without authority is void, both as a statutory bond and as a common-law obligation."

To the same effect are *Morrow v. State*, 5 Kan. 563; *United States v. Goldstein*, 1 Dill. 413, [Fed. Cas. No. 15,226]; *Vose v. Deane*, 7 Mass. 280; *Commonwealth v. Loveridge*, 11 Mass. 337.

In *State v. Winninger*, 81 Ind. 51, it is said: "It is well settled that a bond or recognizance taken by a court without jurisdiction, or an officer without authority, is utterly void."

In *Benedict v. Bray*, 2 Cal. 251, [56 Am. Dec. 332], and *People v. Cabannes*, 20 Cal. 529, it was held that a bond exacted by a justice of the peace without authority was void.

In *Commonwealth v. Roberts*, 1 Duvall, 199, after holding that a bond taken without authority is void, the court said: "It is not within the province of courts to invest persons with authority to take bonds and discharge prisoners from custody, from whom the legislature have withheld such authority; nor should courts, by recognizing such as binding on either party, contravene the policy of the commonwealth in designating by law the officers authorized to bind her."

Inasmuch as the warrant and bond clerk has no authority to fix the amount of bail to be given for the release of persons charged with crime, to hold the bond in this case valid would be for this court, in a measure, to sustain a practice whereby persons charged with crime might be released from custody contrary to the plain mandate of the statute. This we cannot do.

The judgment appealed from is affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 215. First Appellate District.—September 27, 1905.]

In the Matter of the Estate of PAUL BOUYSSOU, Deceased,
JEAN BOUYSSOU, Appellant, v. ALEXANDRE
VAYSSIE, Respondent.

APPEAL—JURISDICTION IN PROBATE MATTERS.—Appellate jurisdiction in probate proceedings is limited to such probate matters "as may be provided by law," and does not extend to any cases not enumerated in section 963 of the Code of Civil Procedure.

ID.—NON-APPEALABLE AND APPEALABLE ORDERS—VACATING REFUSAL OF PROBATE—VACATING APPOINTMENT OF ADMINISTRATOR.—An order vacating an order refusing probate of a will is non-appealable, and an appeal therefrom will be dismissed; but an order vacating the appointment of an administrator is appealable, and a motion to dismiss an appeal therefrom will be denied.

ID.—ORDER SINGLE IN FORM—DISTINCT PROCEEDINGS—DISTRIBUTIVE CONSTRUCTION.—An order single in form granting a "motion to vacate order refusing probate of will and appointing administrator," relates to wholly distinct proceedings, and is to be construed distributively, as containing separate non-appealable and appealable orders.

MOTION to dismiss appeals from an order of the Superior Court of the City and County of San Francisco vacating an order refusing probate of a will and from an order vacating the appointment of an administrator. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Philip L. Manson, and Lucius L. Solomons, for Appellant.

Jacob Samuels, and Oscar Samuels, for Respondent.

HARRISON, P. J.—A document purporting to be the last will and testament of the above-named deceased, together with a petition for its probate, was filed with the superior court in and for the city and county of San Francisco November 2, 1904, and on November 17th the court made an order denying it probate. Thereafter, December 9th, upon the application of the respondent herein, an order was made by the court vacating this order of November 17th. From

this latter order an appeal was taken by the administrator of the estate. The respondent now moves to dismiss the appeal upon the ground that it is a non-appealable order.

The constitution has conferred upon the supreme court appellate jurisdiction only in such probate matters "as may be provided by law"; and in section 963 of the Code of Civil Procedure the legislature has enumerated such matters as it has deemed appropriate to have reviewed by the supreme court. An order revoking an order refusing to admit a will to probate is not named in that section, and consequently is not within the appellate jurisdiction of the supreme court. (See *Estate of Cahill*, 142 Cal. 628, [76 Pac. 383].)

The appeal herein purports to be taken by the administrator of the estate of the above-named decedent, and at the hearing of the motion it was urged on his behalf that, as an order revoking letters of administration is expressly made appealable by section 963, the appeal from that portion of the order should not be dismissed. The bill of exceptions merely refers to the order of November 17th as "denying probate of will and appointing administrator," without setting forth the order at length, and the order from which this appeal is taken is in the following words: "Motion to vacate order refusing probate of will and appointing administrator granted."

Although this is in form a single order, yet, as the order refusing probate of the will and the order appointing appellant as administrator were distinct proceedings before the superior court, this order revoking them must be read distributively and regarded as severally applicable to the former orders. The proceedings for the appointment of an administrator of the estate of a deceased person and for admitting a will to probate are entirely distinct, and are conducted upon different lines of procedure. The appointment of an administrator with the will annexed is to be made in the manner as provided for the granting of letters in cases of intestacy. (Code Civ. Proc., secs. 1350, 1426.) There is nothing in the bill of exceptions which indicates that the appointment of the appellant as administrator of the estate of the deceased did not proceed upon a record separate from that for the probate of the will, or that it was in any respect dependent upon the order denying probate to the will; and as

the order vacating this appointment is appealable the respondent's motion to dismiss the same must be denied.

The appeal from the order vacating the order denying probate to the will is dismissed. The motion to dismiss the appeal from the order vacating the appointment of an administrator is denied.

Hall, J., and Cooper, J., concurred.

[No. 35. Third Appellate District.—September 23, 1905.]

JOSEPH R. ENSCOE, Respondent, v. JOSEPH H FLETCHER, Administrator of Estate of W. E. McNeil, Deceased, Appellant.

ESTATES OF DECEASED PERSONS—CLAIM UPON NOTES—ACTION UPON REJECTED CLAIM—SUFFICIENCY OF COMPLAINT.—Although, where a claim against the estate of a deceased person is rejected in whole or in part, a recovery in an action thereon is limited to the items of the claim rejected, yet, where action is upon the identical notes rejected, and additional facts stated in the complaint are merely explanatory of the demand, and no different contract is stated from that set forth in the claim, the cause of action is upon the claim; and the complaint is not rendered objectionable because of the mere segregation and lumping of certain classes of items not affecting their amount.

ID.—DEATH OF PAYEE—DISTRIBUTION OF NOTES TO JOINT MAKER AS HEIR—CLAIM AGAINST CO-MAKER—CONTRIBUTION NOT INVOLVED.—Where the notes sought to be enforced were never paid to the original payee, and after his death were distributed to one joint maker as heir of the payee, the only effect of such distribution was merely to extinguish the equitable share of the liability of such joint maker, and he is entitled by succession to the rights of the payee, by operation of law, to enforce one-half of the liability upon the notes as a claim against the estate of the deceased co-maker. No claim for contribution is involved in such case.

APPEAL from a judgment of the Superior Court of Plumas County. C. E. McLaughlin, Judge.

The facts are stated in the opinion of the court.

J. D. Goodwin, and U. S. Webb, for Appellant.

L. N. Peter, and Solinsky & Wehe, for Respondent.

BUCKLES, J.—This is an action on a claim presented to the administrator of the estate of W. E. McNeil, deceased, which claim was allowed in part and rejected in part,—allowed for \$145.92 and rejected for \$3,437.50. The claim consisted of the amount due on four promissory notes, which were set forth in full in the claim, with interest thereon, and other items. The disallowance was mainly on the notes. A copy of the claim is contained in the complaint. These notes were all made at the same time, to wit, February 1, 1891, and for one thousand dollars each, and were payable on February 1, 1898, February 1, 1899, February 1, 1900, and February 1, 1901. The notes are joint notes, one J. Enscoe being the payee and J. R. Enscoe and W. E. McNeil being the joint makers. The claim does not set forth the relationship of J. Enscoe, the payee, and J. R. Enscoe, the joint payor, nor does it state how J. R. Enscoe became the holder or owner of said notes, nor what right he had to ask payment to himself of one half of said notes further than whatever presumptions might arise from the facts that he was in possession of the notes and that he was a joint maker. The complaint shows that the payee, the said J. Enscoe, was the father of J. R. Enscoe, and died October 19, 1894; that his estate was probated, and that on May 19, 1898, the superior court by its decree and judgment distributed the said notes to the said J. R. Enscoe, as the heir at law of the said J. Enscoe; that on November 30, 1901, the other joint maker of the said notes, W. E. McNeil, died, and the defendant, Joseph Fletcher, became the administrator. The answer alleges payment of said notes by J. R. Enscoe, May 19, 1898, the date of the decree distributing the notes to him, and that the obligation on the notes being extinguished plaintiff became entitled to contribution from said W. E. McNeil, and that such right of action accrued to plaintiff; and that more than two years had elapsed since such right accrued and before McNeil's death, and that it is therefore barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure.

Judgment was for plaintiff, the court finding the estate of W. E. McNeil to be liable for one half the principal and interest due on said notes,—to wit, the sum of \$3,320,—and that other items of said claim amounting to \$220.42 were also

a charge against said estate, and rendered judgment for the sum of \$3,540.42. The judgment was made up of the following items: Notes, \$3,320; amount allowed on the claim, \$145.92; and for insurance the sum of \$74.50.

The appeal is from the judgment.

Appellant contends that the claim as presented to the administrator cannot be reconciled with the complaint, in this, that the demand is not the same in the complaint as made in the claim. In an action upon a claim presented and rejected in an estate of a deceased person, no recovery can be had for anything outside of the items of the claim itself,—that is to say, the recovery must be upon the same cause of action as set up in the claim. (*Lichtenberg v. McGlynn*, 105 Cal. 45, [38 Pac. 541].) A claimant cannot come into court and allege and prove any other or different contract or cause of action from that stated in his claim. In *Etchas v. Orena*, 127 Cal. 590, [60 Pac. 45], the claim presented was for services rendered the deceased for six months in each year at thirty dollars per month, and during the other six months at the rate of five dollars per month, the claim amounting to twenty-one hundred dollars. A payment of nine hundred dollars having been made, there was a balance of twelve hundred dollars still due. The complaint alleged that deceased promised plaintiff and agreed to pay her the reasonable value of her services by making provision in her will for plaintiff for a sum equal to the value of the said services, and in consideration of such promise plaintiff rendered the services. The items were the same in amount in both claim and complaint, but the contract under which the services were rendered being different from the contract stated in the claim, the court there held that no recovery could be had. (*Galagher v. McGraw*, 132 Cal. 601, [64 Pac. 1080].)

In the case before us the complaint sets forth the identical notes on which the claim is based and which are also set out in full in the claim. The claim shows upon its face that plaintiff seeks to recover only one half the amount of principal and interest due on the said notes of which he is joint maker; it also appears on the face of the notes that the other of the joint makers bears the same name as did the deceased against whose estate the claim was presented,—to wit, W. E. McNeil. The complaint sets forth more facts in relation to

the notes than does the claim, but the cause of action is not changed. The demand in the claim was for payment of the one half of the notes just as he had obligated himself to do in his lifetime and the complaint is for exactly the same thing. There is therefore no difference in the demands, and all the additional facts stated in the complaint are but explanatory of the demand and neither add to nor take away a single thing. Both demands are identical in every respect, and it seems to us that is all that is required under section 1500 of the Code of Civil Procedure, and the authorities cited by the appellant, to wit: *Lichtenberg v. McGlynn*, 105 Cal. 45, [38 Pac. 541]; *Barthe v. Rodgers*, 127 Cal. 54, [59 Pac. 310]; *McGrath v. Carroll*, 110 Cal. 88, [42 Pac. 466]; *Etchas v. Orena*, 127 Cal. 590, [60 Pac. 45]; *Gallagher v. McGraw*, 132 Cal. 601, [64 Pac. 1080]; *Morehouse v. Morehouse*, 140 Cal. 88, [73 Pac. 738].

The fact that plaintiff in his complaint has segregated and lumped certain classes of items of the claim without increasing or diminishing the amount of any item and without alleging any different contract as to liability on any such items than appears on the face of the claim seems to us to be without reason for objection.

We now come to consider what seems to be the real point in the case, and the one to which appellant has directed the greater part of his argument; that the notes were paid when distributed to plaintiff and the obligation extinguished, and that the only claim J. R. Enscoe could have made was one of contribution, and that such a claim would be barred by the statute of limitations. It is clear the notes were never paid to the original payee, J. Enscoe, for he died while he was yet the owner and holder of the notes, and prior to May 19, 1898, the date at which appellant contends the payment was made. There can be no dispute as to the rule that where two or more persons are jointly liable on an obligation and one of them makes payment of the *whole*, that obligation is thereby extinguished, and the one paying has a new obligation against the others for their proportion of what he paid for them. If these notes were paid and the obligation extinguished, it is solely by operation of law and brought about by the death of the payee and the distribution of his estate, including the notes, to his heir who was a joint maker of the notes. And

as we understand it, this is the earnest contention of appellant, who cites the following cases in support of that contention: *Gordon v. Wansey*, 21 Cal. 79; *James v. Yeager*, 86 Cal. 186, [24 Pac. 1005]. In the first case one H. and three others made their joint and several negotiable promissory notes. The payee afterwards assigned the notes for valuable consideration to said H. This was before maturity. After maturity, for valuable consideration, H. assigned the notes to Gordon, the plaintiff, and Gordon brought his action on the notes and against all the joint makers and recovered judgment, and the supreme court declared such judgment to be erroneous. The court also says in that case that the first assignment amounted to payment, and that the notes became *functus officio*, and were not revived by the second assignment. In the second case the court said: "The purchaser of a note from the maker, after maturity, cannot claim to be an innocent holder, nor can he claim as against the maker or any one else, that the note has not been extinguished if it has in fact been paid." In that case the joint note was paid to the payee by one of the makers and the note was delivered to the joint payor who had paid it. Of course, if these notes in the case before us come within the rule in the cases cited then the plaintiff has no right to recover. In applying this rule that payment by a joint maker extinguishes the obligation, we understand that "payment" means payment in full for everything due on the obligation. In *Yule v. Bishop*, 133 Cal., at p. 579, [65 Pac. 1094], Justice Henshaw uses the following language: "In this state, therefore, it seems to be well settled, both by the language of the code, and by the decisions of this court under it, that full payment and performance by the surety extinguishes the primary obligation." Here the obligation was never performed, and plaintiff has never been entitled to an action against McNeil for contribution. The obligation of the joint makers is presumed to be equal, and all that was ever satisfied or paid by the distribution to plaintiff was his equitable share, the one half of the principal and interest due on said notes. When the notes came to the heir by the decree of distribution but one had matured, so that there could have been no compulsion on the part of plaintiff to have made any payment on any of the

notes save the one which fell due February 1, 1898. But under the view we take of the case, that there was never a time when contribution could have been maintained, it is useless to pursue that point further. The defendant claims that the effect of the decree of distribution was to transfer or assign the notes to a joint maker and thus extinguish the obligation. In this connection it would be well to examine the law of transfer, performance, relinquishment, and joint obligations. Under section 1039 of the Civil Code, "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Surely the case before us does not come under or within this definition, for the notes descended from the dead to the living. Transfer rests upon acts of parties to a contract, as does assignment, which is but a written transfer. Here there is no act of omission or commission by any of the parties. The law simply changes the position of the parties.

Then section 1457 of the Civil Code says: "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise." In this instance the payee, J. Enscoe, being dead, could not consent. His heir is certainly entitled to every benefit arising from the obligations descending to him, consistent with equity and fair dealing toward his opponent, and he has not consented.

The notes are negotiable and are transferable only by indorsement. There was no indorsement. It seems to me that an analysis of these rules declared by our code, points a wide difference between "succession," as defined and regulated in title seven, division two, and "transfer of obligation," as defined and regulated in title three, division three.

The question is, of course, were the obligations of the notes extinguished? Section 1473 of the Civil Code provides: "Full performance of an obligation, by the party whose duty it is to perform it, or by any other person in his behalf, and with his assent, if accepted by the creditor, extinguishes it." Section 1474 provides: "Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all." Section 1478 provides: "Performance of an obligation for the delivery of money only is called payment." Section 1541 of the Civil Code provides: "An obligation is extinguished by a release therefrom given

to the debtor by the creditor, upon a new consideration, or in writing, with or without a new consideration." Section 1543 of the Civil Code provides: "A release of one of two or more joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors; nor does it affect their rights to contribution from him." Section 3164 of the Civil Code provides: "The obligation of a party to a negotiable instrument is extinguished: 1. In like manner with that of parties to a contract in general; or, 2. By payment of the amount due upon the instrument at or after its maturity, in good faith and in the ordinary course of business, to any person having actual possession thereof and entitled by its terms to payment." Section 1524 of the Civil Code provides: "Part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing, for that purpose, though without any new consideration, extinguishes the obligation."

We think that in a careful reading and fair analysis of these sections when considering the facts in this case, it is clear there was no performance, no payment of the amount due in good faith and in the due course of business, or at all, and no satisfaction, except as to the one half due from plaintiff (which comes merely by reason of the operation of the law), and therefore there could be no extinguishment of these obligations unless it could in some mysterious way be brought about by reason of the plaintiff being released from payment by operation of law which it is claimed canceled the obligation to which he was a party and to the benefit of which he had succeeded without any act of his. A release of J. R. Enscoe by the payee in his lifetime upon the payment by the said J. R. Enscoe of one half the whole obligation, under the provisions of said section 1543, would not have released McNeil nor extinguished the obligation. McNeil was not mentioned in the decree of distribution, the instrument by which it is claimed the obligation was extinguished. Of course, it would have been otherwise had J. R. Enscoe paid the whole amount due, and then plaintiff's remedy would have been for contribution. (*North Ins. Co. v. Potter*, 63 Cal. 158; *Roberts v. Donovan*, 70 Cal. 114, [9 Pac. 180, 11 Pac. 599].) In *Wristen v. Curtiss*, 76 Cal. 6, [18 Pac. 81], it is held that a re-

lease of one of several jointly liable on a promissory note, who are not mere guarantors, does not release the other obligors. No matter what theory may be put forth as to the release of one jointly liable and the extinction of the obligation, nor what the law may be on the subject in other states, "the code establishes the law of this state respecting the subject to which it relates" and the code (sec. 1543) says a "release of one joint debtor does not extinguish the obligation." So that if plaintiff had actually paid one half of the whole amount due on said notes, the obligations, the notes would have still held good as against McNeil. (See *McDowell v. Jacobs*, 10 Cal. 390.)

The \$74.50 expended by the administrator for insuring the property of the estate, having been contracted after McNeil's death, is not properly a claim against his estate, yet it is a charge against the estate, being an item of expense incident to preserving the property during the course of administration, and is entitled to payment prior to payment of debts, and its allowance as a debt could not be prejudicial to the estate.

We see no vital objection to the amount allowed by the administrator, to wit, \$145.92.

For the reasons herein stated the judgment is affirmed.

Chipman, P. J., and McLaughlin, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on November 24, 1905.

[No. 136. First Appellate District.—September 29, 1905.]

ELIZA RUPPEL, Administratrix, etc., Respondent, v.
UNITED RAILROADS OF SAN FRANCISCO, Ap-
pellant.

NEGLECT—ACTION FOR DEATH—ORDER GRANTING NEW TRIAL—SUPPORT OF VERDICT—DISCRETION—CONFLICTING EVIDENCE.—In an action by an administrator for the death of his intestate owing

to the alleged negligence of the defendant, where the verdict was for the defendant, upon plaintiff's motion for a new trial for insufficiency of the evidence to support the verdict, it is the duty of the trial judge to exercise his judgment and discretion in reviewing the evidence, and though it is conflicting, to grant a new trial if he does not believe that the verdict is the correct conclusion from all the evidence. This court will not interfere with the order granting a new trial where no abuse of discretion appears.

ID.—DAMAGES RECOVERABLE.—Where the evidence tends to show that the death resulted from the actionable negligence of the defendant, though the recovery is limited to the value of the pecuniary interest of those entitled to recover damages therefor, yet such value is not a precise sum, but such damages are allowable as, "under all the circumstances, may be just." It cannot be said as matter of law that a wife and minor children are entitled only to nominal damages for the wrongful death of the husband and father caused by defendant's negligence, notwithstanding the absence of proof of important circumstances to be considered by the jury in estimating the pecuniary damages to which the wife as administratrix of her deceased husband would be entitled.

APPEAL from an order of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Morrison & Cope, for Appellant.

Stafford & Stafford, for Respondent.

COOPER, J.—This is an action by the plaintiff, as administratrix of the estate of Conrad Ruppel, deceased, to recover damages, alleged to have been sustained by the heirs of the deceased, by reason of his death, resulting from the alleged negligence of the defendant corporation in the operation of its cars on the public streets of the city of San Francisco.

The jury returned a verdict for defendant. On motion of plaintiff the court below granted a new trial, on the ground that the evidence does not support the verdict, but shows negligence on the part of the defendant.

This appeal is by defendant from the order.

The judge of the trial court saw the witnesses and heard the evidence while looking at them, and for this reason is much better qualified to judge of their credibility and the value of the evidence than we are. It is the duty of the trial

judge, on a motion for a new trial, to exercise his judgment and discretion in reviewing the evidence, and, even though it is conflicting, to grant a new trial if he does not believe the verdict is the correct conclusion from all the evidence. The power of the trial court to so review the evidence is a salutary one, and often prevents great injustice from being done by an erroneous verdict. It is only in cases of abuse of discretion that this court will interfere. We have carefully examined the evidence and find no such abuse of discretion.

The evidence tends to show that early in the morning of April 5, 1902, the deceased, in a light wagon, was driving a single horse along and down Mission Street in the city of San Francisco at a place where there was a slight incline in the grade. A street-car belonging to defendant, on which there were passengers, a motorman, and conductor, going in the same direction, ran up from behind, and struck the hub of the left hind wheel of deceased's wagon, precipitating him to the ground in a violent manner and killing him almost instantly. The car and wagon were in full sight of each other for several hundred feet prior to the collision, and the wagon was in full sight of the motorman. It is not clear from the evidence whether any portion of the wagon was on the defendant's track at the time of the collision or not, but it is not material, as it is clear beyond question that the left hind wheel of the wagon was, if not on the track, near enough to it that the car, instead of passing, struck it, thus causing the death. There is evidence that the car was going pretty fast, and one witness testified that in his opinion it was going at the rate of about ten miles an hour. All the evidence shows that the motorman did not ring the bell until in close proximity to the wagon, some of the witnesses placing it at ten feet.

The motorman testified that he rang the bell when within about a car's length (twenty-six feet) of the wagon; that it would be a good stop to stop the car in half its length (thirteen feet); that when he saw he could not pass the deceased he was a car's length distant. He not only did not stop the car, but it ran eight feet beyond the point where it struck the wagon, making thirty-four feet after the motorman saw he could not pass the wagon. The motorman testified that as he approached the wagon at some distance it was not on the track, but as he arrived in dangerous proximity to it, it

"swerved" in toward the track, making it impossible for him to stop the car in time to avoid the collision. It is not our province on this appeal to determine the question as to the truth of this evidence. The court below, in granting the new trial, had the right to reject it. The evidence tending to show that the defendant's car approached deceased at a rapid rate of speed and ran into his wagon, which was in plain view for several hundred feet, and this without ringing a bell until too late to give warning, required careful consideration at the hands of the trial judge.

Appellant contends that there was no evidence as to damages, and invokes the rule that the court should not grant a new trial in a case where the plaintiff would only be entitled to nominal damages.

The evidence show that the deceased left surviving him a widow (plaintiff) and four children, the youngest child being a minor twelve years of age.

At common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party. (4 Sutherland on Damages, 3d ed., sec. 1259, and cases cited.) In most, if not all, the states the statutes or codes provide for recovery of damages by the heirs against the party who causes the death of another by negligence.

Our statute provides (Code Civ. Proc., sec. 377): "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The theory of the above section, and of similar statutes, is that those who are so entitled to recover damages have a pecuniary interest in the life of the person killed, and hence the amount of recovery is limited to the value of that interest.

But *pecuniary interest* does not mean a precise sum in money measured and demonstrated by evidence. The language of our statutes does not so limit it, because it allows such damages as under "all the circumstances of the case may

be just." It is said in *Sutherland on Damages* (3d ed., vol. 4, sec. 1263), quoting from *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 257, 286, 387, [86 Am. Dec. 297]: "A liberal scope was designedly left for the action of the jury; they are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death; they are not tied down to any precise rule. Within the limit of the statute as to the amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and discretion. They must be satisfied that pecuniary injury resulted. If so satisfied they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture, or moral training, which the mother had before supplied, they are at liberty to allow for it."

In *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 37, an instruction given by the lower court that the jury might take into consideration the pecuniary loss "suffered by this plaintiff in the death of said George Beeson by being deprived of his support; also the relations proved as existing between plaintiff and deceased at the time of his death, and the injury, if any, sustained by her in the loss of his society," was approved, and the court in commenting on Code of Civil Procedure, section 377, applied to the instruction, said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case' for the jury to take into consideration in estimating what damages would be just, from a pecuniary point of view, especially as there is nothing in the case to show that the jury might give damages by the way of solace."

The *Beeson* case has since been cited and approved. (*Morgan v. Southern Pacific Co.*, 95 Cal. 517, [29 Am. St. Rep. 143, 30 Pac. 603]; *Keast v. Santa Ysabel Mining Co.*, 136 Cal. 260, [68 Pac. 771].) The late case of *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, [66 Pac. 72], is directly in point. The court there said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount

that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. . . . If the circumstances which were before the jury show that by reason of the injury he has become unable to perform the labor, or transact the business, which he was accustomed to transact or perform prior thereto, he is entitled to recover damages therefor, and from the nature of the investigation the amount of such recovery must be left to the wise discretion of the jury."

While we think that if the plaintiff had proven that deceased was a man in sound bodily health, and in receipt of monthly wages, or salary, these matters would have been very important circumstances to be considered by the jury in estimating the pecuniary damages to which plaintiff would be entitled, yet, we do not deem the absence of such proof conclusive of the fact that plaintiff is only entitled to nominal damages. We cannot say, as matter of law, that plaintiff can only recover nominal damages for the death of her husband if caused by defendant's negligence while he was driving a horse upon the public highway.

Not only this, but the point seems not to have been raised in the trial court.

The case of *Burk v. Arcata etc. R. R. Co.*, 125 Cal. 364, [73 Am. St. Rep. 52, 57 Pac. 1065], is not in conflict with, but supports, the views herein expressed.

That action was brought by adult collateral heirs. The court said: "The statutes upon this subject seem to be framed upon the idea that the heirs would always constitute the family of deceased. In some states the beneficiaries of this statute are so limited. We can easily understand that a life may be of great pecuniary value to such persons. Collateral heirs, at all events, must prove probable loss, or their recovery will be limited to nominal damages."

The order is affirmed.

Hall, J., and Harrison, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on November 24, 1905.

[No. 50. Third Appellate District.—September 30, 1905.]

**SACRAMENTO PAVING COMPANY, Respondent, v.
JAMES ANDERSON, Appellant.**

STREET IMPROVEMENT—PRESENTATION OF RESOLUTIONS TO MAYOR—FREEHOLDERS' CHARTER—STATUTE INAPPLICABLE.—Where the freeholders' charter of a city does not require resolutions to be presented to the mayor, a resolution of intention to improve a street and the resolution ordering the work done under such charter need not be presented to the mayor for his approval. The act of March 27, 1897, requiring resolutions to be presented to the mayor, has no application to a city working under a freeholders' charter.

ID.—ESTIMATE OF STREET WORK UNDER VROOMAN ACT.—The Vrooman Act does not appear to require an estimate of street work before passing the resolution of intention unless the municipal board should be desirous of issuing serial bonds for the work, or to place the work in a district.

ID.—POSTING OF NOTICES—OBJECT AND EXTENT OF REQUIREMENT.—The object of the statute requiring the street superintendent to post notice of the passage of the resolution of intention "along the line of said contemplated work or improvement" is to give the persons interested a chance to know what is intended, so they can appear and state any objections they may have. It is sufficient that the notices are posted as required along the entire line of the contemplated work; but it is not necessary to post any notice in a block not mentioned in the resolution, upon which no work is to be done and no part of which can be assessed for the work proposed.

ID.—SEPARATE PARTS OF STREET—SINGLE CONTRACT.—The fact that the work is to be done upon separate parts of the same street, omitting a block therein, does not preclude the letting of the work by a single contract where the work is not of a different character on any part of such street.

ID.—CONSTITUTIONALITY OF VROOMAN ACT—PASSAGE OF CONSTITUTIONAL AMENDMENT.—The Vrooman Act is constitutional under the amendment of section 19 of article XI, proposed by the legislature in 1883 and properly submitted to the people at the general election in 1884 as constitutional amendment No. 1. The bill proposing that amendment, with its indorsement, shows that it was properly enrolled, authenticated, and deposited with the secretary of state as having been passed by the legislature; and the journal cannot be looked to to rebut or set aside the presumption thus raised that it was properly passed.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial. Peter J. Shields, Judge

The facts are stated in the opinion of the court.

R. Platnauer, for Appellant.

Chauncey H. Dunne, and J. H. Liggett, for Respondent.

BUCKLES, J.—This is an appeal from an order denying defendant's motion for a new trial in a case of street-assessment work on Eighteenth Street in the city of Sacramento. Work commenced at the south line of the alley between B and C streets and running south to the north line of E Street; from the south line of E Street to the north line of G Street; from the south line of G Street to the north line of H Street and so on to L Street, omitting the cross streets; then commencing again at the south side of M Street running south, omitting the cross streets N, O, P, and Q, to the north line of R Street. The judgment was for the plaintiff, and the defendant appeals. The appellant sets forth the following as assignments of error:—

1. The resolution of intention and the resolution ordering the work were not presented to the mayor, and should have been presented to him for his approval;

2. The city surveyor did not furnish estimates of the cost of the proposed work to the board of trustees *before* the adoption of the resolution of intention;

3. The notice prescribed by the statute was not given;

4. The defendant's property was assessed for the cost of work for which it was not legally liable;

5. Section 19 of article XI of the constitution as adopted in 1879 has never been amended, and the Vrooman Act is unconstitutional.

As to the first assignment of error. Sacramento was operating under a freeholders' charter adopted February 7, 1893, when the street work began. That charter did not require a *resolution* to be presented to the mayor for his signature. March 27, 1897, the legislature passed an act providing that every ordinance and every resolution of the city council of any municipality . . . which shall have passed the city council, shall, before it takes effect, be presented to the mayor for his approval. But this act has no application, in this respect, to a city working under a freeholders' charter. (*Morton v. Broderick*, 118 Cal. 486, [50 Pac. 644].)

As to the second assignment of error. The law (Vrooman Act) does not seem to require as a prerequisite that the city council should have an estimate of street work before it passes the resolution of intention, unless the council should be desirous of issuing serial bonds for the work or to place the work in a district. (*Petaluma Pav. Co. v. Singley*, 136 Cal. 618, [69 Pac. 426].)

As to the third assignment of error. Along Eighteenth Street, between the north line of L and the south line of M, there was no street work in this contract and no notices were put up for a distance of one whole block, a distance of more than five hundred feet; the work coming down Eighteenth Street from the north to the north line of L Street and continuing south on Eighteenth Street from the south line of M Street. Notices were put up properly along the frontage where any work was done, and as no work was let and none done on Eighteenth Street where the blocks between L and M streets fronted, it would seem that no notices were necessary. The statute prescribes that the street superintendent shall "cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than one hundred feet in distance apart, but not less than three in all, or where the work to be done is only upon a certain crossing or any part thereof, in front of each quarter block and irregular block liable to be assessed, notice of the passage of said resolution."

"In proceedings where the property of the citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with; and when the form of a statutory proceeding is prescribed its observance becomes essential to the validity of the proceedings." (*Shipman v. Forbes*, 97 Cal. 572, [32 Pac. 599]; *Chase v. Treasurer Los Angeles*, 122 Cal. 545, [55 Pac. 414].) If it is necessary to put up notices along this five hundred feet where no work is to be done, then, of course, the notice is not sufficient to give the city council jurisdiction. The notice required by the statute is clearly to give the persons interested a chance to know what is intended so that such interested persons can appear and object if any objections they have. None are legally interested except those having a frontage on the proposed work, the landowners liable to as-

assessment for the work, and none others can object. It would be idle to put a notice where none are entitled to have notice. Where there is one block along a street proposed to be improved, and this block on the street in front of it is not included in the improvement, then for the purposes of the notices it appears to us that such block is not "along the line of said contemplated work or improvement." It is not in such work and therefore we may ask "need any notice be posted on such block?" But appellant offers the following authorities as sustaining his position, that notice must be posted on the blocks along Eighteenth Street, between L and M streets, where no work was to be done: *Hewes v. Reis*, 40 Cal. 255; *Hixon v. Brodie*, 45 Cal. 275; *Shipman v. Forbes*, 97 Cal. 572, [32 Pac. 599]; *Chase v. Treasurer of Los Angeles*, 122 Cal. 540, [55 Pac. 414]; and *Dowling v. Hibernia Sav. and L. Society*, 143 Cal. 425, [77 Pac. 121]. In *Hewes v. Reis* the notice was posted but three days, when the statute required it should be posted five days. It was held this was such a defect as to render all subsequent proceedings void. *Nixon v. Brodie* has no bearing on the questions whatever further than to approve of *Hewes v. Reis*. In *Shipman v. Forbes* the question was as to a date in the assessment, which read "San Francisco, 1885," and the court held this insufficient and not to comply with the statute as to giving date. In *Chase v. Treasurer of Los Angeles*, 122 Cal. 540, the notice of intention was published in a newspaper without the previous order of the board that it should be published in that paper. This made the publication of notice void. In *Dowling v. Hibernia Sav. and L. Society* the resolution stated that it was the intention of the board to order the following street work, viz.: "That granite curbs be laid in Henry Street between Sanchez and Noe streets where not already laid, and that the roadway thereof be paved with bituminous rock, where not already so paved." Some of the street in front of some of the lots on Henry Street between Sanchez and Noe streets had already been paved and was not included in the work to be done. The proof showed that notices had been conspicuously posted along the line of Henry Street between Sanchez and Noe streets, notices not more than one hundred feet in distance apart, and six notices in all. Held that along the line of Henry Street was along the line of the contem-

plated work described in the resolution of intention. The court said in that case, "The line of the contemplated work or improvement, within the meaning of the statute, is precisely the same as if no such exception of work already done had been made," and we understand from this expression that had the resolution of intention read "That granite curbs be laid in Henry Street between Sanchez and Noe streets, and that the roadway thereof be paved with bituminous rock," then the notices would have had to be posted just as they were. That the law reasonably construed requires the notice to be posted along the *entire* line of the contemplated work, there can be no doubt. The whole line of improvement was between two streets five hundred and sixty feet apart, and the record shows that the block had been improved its full width part of the way and had been improved part of its width on one side of the street and part of its width on another portion of the street, so that it was irregular portions of the street in that block that were to be improved. In the case before us, no mention whatever is made of the street between L and M streets, and the approved rule laid down in the Dowling case (143 Cal. 425, [77 Pac. 121]) does not and cannot be made to mean that a portion of a street, a whole block and upwards, not mentioned in the resolution of intention, no portion of the land fronting on which can be assessed for the work, is "along the line of the contemplated work" merely because some work is done on the street in front of the other blocks on both sides of such block, so that notices of such work must be posted along such block on which no work is to be done. Putting notices along Eighteenth Street between L and M streets might tend to confuse the property-owners along said part of Eighteenth Street and could be of no benefit or information to landowners in other blocks who would become liable for the work done under the resolution of intention. The notices were sufficient and accomplished all intended by the statute.

As to assignment of error number four.

Just how defendant's property was assessed for the cost of work for which it was not legally liable does not appear. All the work to be done on Eighteenth Street was let in one contract. The fact that the portion of Eighteenth Street between L and M streets was not included in the contract would

tend to lessen the rate per front foot, while had the work been let in two contracts there would not have been as many curbs and curves to pay for in the part south of M Street, the part in which defendant's property is located, and probably the cost to him in that event might have been a little less per front foot. In the case cited by appellant, that of *Bates v. Twist*, 138 Cal. 52, [70 Pac. 1023], it was held that the designation of a street or portion of a street which is to be improved, with a description of the work to be done thereon, becomes thereby a distinct and several improvement whether it be the only improvement specified in the resolution of intention or in the resolution ordering the work, or whether other improvements are included in it; and that when the character of the improvements on different portions of the same street is different, they are of necessity independent items of street work.

But in the case at bar the work is not different on any part of Eighteenth Street, and no reason is apparent why the work should have been divided up in two or more contracts.

As to assignment of error number five. Appellant asks this court to override a constitutional amendment which has been before the supreme court on at least three different occasions upon the same question and the validity of the amendment upheld each time. He alleges that upon every occasion in which this question has been presented to the court the facts have been misstated and alleges the true facts to be that the amendment under discussion was never entered in the journal of the assembly either by identifying reference or in any other manner. If section 19 of article XI was not amended in 1883, then the Vrooman Act would be in violation of that section as it was originally adopted, for as it originally stood, no street work chargeable to private property could be contracted for or commenced until the money had been collected and was in the treasury. The court below found: "And I further find that constitutional amendment No. 1, proposed by the legislature of the state of California at its regular session of 1883, and which constitutional amendment No. 1 and known as senate bill No. 10, was entered in the journals of the two houses of said legislature with the yeas and nays taken thereon, as provided in section 1, article XVIII of said constitution of the state of California, and

that said constitutional amendment No. 1, amending section 19, article XI of the constitution, was duly adopted and ratified and is now a part of the constitution of the state of California, and was at all times during the proceedings of the board of trustees of the city of Sacramento alleged in the complaint in this action." The evidence showed that in one or two instances the written journal, when the constitutional amendment was up for discussion refers to senate bill No. 17 when it is plain senate bill No. 10 was intended, and the evidence before the lower court showed that this clerical error had been corrected in the printed journal. But aside from this the bill itself with its indorsements thereon shows that it was properly enrolled, authenticated, and deposited with the secretary of state as having been properly passed by the legislature, and the journal cannot be looked to to rebut or set aside the presumption thus raised that this constitutional amendment was properly passed. The evidence before the trial court further shows that the proposed amendment to section 19 of article XI was properly submitted to the people at the general election in 1884 as constitutional amendment No. 1.

The evidence supports the finding.

The judgment is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

[No. 67. Second Appellate District.—October 2, 1905.]

JAMES H. GRIFFIN, Respondent, v. PACIFIC ELECTRIC RAILWAY COMPANY, Appellant.

NEGLIGENCE—INJURY TO RAILWAY PASSENGER—CONSTRUCTION OF FINDING—DAMAGES—PRESUMPTION.—In an action for negligence of a railway company causing an injury to plaintiff as a passenger, findings for the plaintiff are to receive such a construction as will support the judgment; and a finding that one thousand dollars will compensate plaintiff for the detriment caused will be construed to mean the amount necessary to compensate the plaintiff upon the presumption that the court, in the proper discharge of its duty, fixed no sum greater than was necessary and proper under

the facts before it. The amount so found as compensation for the breach of defendant's duty will be deemed a fixation of the damages allowed for such breach by section 3333 of the Civil Code.

ID.—SUPPORT OF FINDING AS TO NEGLIGENCE—PREPARATION OF PASSENGER TO ALIGHT—SUDDEN JERK—PRESUMPTION.—A passenger has a right as the car is approaching the place of destination to proceed to the door preliminary to alighting; and when, while preparing to alight, the car gave a sudden jerk, without notice, by reason of which he was precipitated to the ground and injured, the law presumes that defendant was not exercising the utmost care and diligence for the safe carriage of the passenger; and as the injury was produced by the carrier in operating the instrumentalities employed in its business, the presumption of negligence follows.

ID.—UTMOST CARE REQUIRED OF CARRIER—DUTY OF SUPERVISION—MEANS OF KNOWLEDGE.—Whatever may be the rule elsewhere, a carrier of passengers in this state must bestow the utmost care, which involves such constant supervision and observation over and of passengers as will insure to the employees accurate information as to the condition and position of those under the carrier's charge. Where the means of knowledge in relation thereto exist, the same rule applies as would obtain where actual knowledge exists.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Bicknell, Gibson, Trask, Dunn & Crutcher, and Norman S. Sterry, for Appellant.

Job Harriman, and Camp & Lissner, for Respondent.

ALLEN, J.—This is an action to recover damages by a passenger on one of defendant's cars, based on the claim of negligence in the operation of a car upon which plaintiff was being carried. Trial was by the court, with findings and judgment against defendant, from which and an order denying a new trial defendant appeals.

The court finds that on September 26, 1902, plaintiff was a passenger on one of defendant's cars which were being operated on Raymond Avenue within the city of Pasadena; that it was the duty of defendant to stop such car at the crossing of Union Street with Raymond Avenue in said city;

that when approaching such street-crossing plaintiff notified defendant's servants to stop thereat that the plaintiff might alight from such car; that the speed of the car was slackened as if to stop, and plaintiff arose from his seat and proceeded to the rear door of the car, which was open, and stood there waiting for the car to come to a full stop; that while standing the defendant's servants carelessly and negligently caused the electric power to be turned on suddenly, thereby giving the car a sudden jerk, by reason of which plaintiff was thrown out of the door of the car and violently to the ground, and was injured and wounded so that he became sick, sore, and disabled, and for a long time was unable to perform his usual work; that the amount which will compensate him for the detriment proximately caused by such injury is one thousand dollars. The court further found that plaintiff was guilty of no contributory negligence, and rendered judgment in plaintiff's favor for one thousand dollars.

Defendant first contends that the judgment is unsupported by the findings; that the finding that one thousand dollars will compensate plaintiff for the detriment caused is not the equivalent of a finding that he was damaged to the extent of one thousand dollars, upon the theory that if he were damaged in a less sum the finding would still be true. Findings of a trial court are to receive such construction as will uphold rather than defeat its judgment, and whenever from the facts found by it other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon appeal from that judgment, this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial judge for the purpose of rendering his judgment. (*Breeze v. Brooks*, 97 Cal. 77, [31 Pac. 742].) And in this case, where the court finds the amount which will compensate, it will be taken to mean the amount necessary to compensate, if for no other reason than that which follows the presumption that a court in the proper discharge of its duty fixed no sum greater than was necessary and proper under the facts before it. That which will compensate for all the detriment proximately caused by the breach of duty is fixed as the measure of damages by section 3333 of the Civil Code,

and when such sum is found and determined it is a fixation of the damage.

Appellant next claims that the finding that defendant negligently and carelessly failed to stop said car at or near Union Street, but instead, and without notice to plaintiff, caused said electric power to be turned on suddenly, causing the car to give a sudden jerk, thereby throwing plaintiff to the ground, is unsupported by the evidence, because it does not appear therefrom that the car did not come to a full stop at Union Street. Whether the car eventually stopped at Union Street or not is of little consequence in this case. The act which produced plaintiff's injury occurred before such street was reached. Under the circumstances of this case, plaintiff possessed the right to proceed to the door preliminary to alighting. In *McCurrie v. Southern Pacific R. R. Co.*, 122 Cal. 562, [55 Pac. 324], the court says: "It cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury." Neither can we say in this case that the conduct of the plaintiff in leaving his seat and proceeding to the door was negligence as a matter of law. And if, as found by the court, the car was so operated as to violently throw plaintiff therefrom, the law presumes that defendant was not exercising the utmost care and diligence for the safe carriage of the passenger. The injury is shown to have been produced by the carrier in operating the instrumentalities employed in its business. The presumption of negligence follows. (*Babcock v. Los Angeles etc. Co.*, 128 Cal. 178, [60 Pac. 780].) The court found no contributory negligence on the part of plaintiff, and there is ample evidence in its support. That the injury was the proximate result of this sudden application of the power is found by the court, and has support in the testimony. Appellant lays much stress upon the proposition that the record does not disclose that defendant had knowledge of the position of plaintiff when the sudden acceleration of speed was attempted, and that it was not negligence to increase the rate of speed, unless the servants of the defendant knew that the result might be injurious to the passenger. Whatever may be the rule in other jurisdictions, in California the care which

the carrier must bestow is the utmost care. This involves such constant supervision and observation over and of passengers as will insure to its employees accurate information as to the condition and position of those under their charge; and when, as in this case, the means of knowledge in relation to the position of plaintiff was in the company, the same rule should apply as would obtain when actual knowledge exists. The finding of negligence on the part of defendant is supported and exists by reason of the want of care in taking precautions to ascertain before applying the current the position of those under its charge, and the reasonable effect to be apprehended by a sudden start.

We find no error in the record, and the judgment and order are affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 12. Second Appellate District.—October 2, 1905.]

W. J. COX, Respondent, v. J. H. ODELL, Appellant.

ACTION FOR NEGLIGENCE—OBSTRUCTION TO SURFACE WATER—BREAKAGE—INJURY TO PLAINTIFF'S LAND—SUPPORT OF FINDINGS.—In an action for negligence in maintaining an embankment on defendant's land to impound water for irrigation, thus stopping surface water, which would naturally flow over plaintiff's land without injury, a breakage of which was caused by storm water, causing injury to plaintiff's land, where the court found for plaintiff and that good husbandry did not require that the embankment be maintained, and the evidence, though conflicting, was sufficient to support the findings, they will not be disturbed upon appeal.

ID.—FLOW OF SURFACE WATER—LAWS OF NATURE.—In the case of surface waters having no definite channel of escape, the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature should be left untrammelled in their disposition.

ID.—OBJECT OF EMBANKMENT—NEGLECT IN CONSTRUCTION—LIABILITY OF DEFENDANT.—Whatever proper object the defendant may have had in the embankment, or right to construct it, where it was so negligently constructed as not to provide outlets for storm water, and such neglect was the proximate cause of the injury, the defendant is liable therefor.

- ID.—OPINION EVIDENCE—BASIS SHOWN.**—Assuming an objection to the opinion evidence of the plaintiff, as to the effect of an outlet for water in a certain end of the embankment, was well taken, yet where the answer contained a statement of the physical conditions surrounding the premises, on which the opinion was based, it relieved itself from the force of the objection.
- ID.—OBSTRUCTIONS CONTRIBUTING TO OVERFLOW—ISSUE AS TO DAMAGES—EVIDENCE WITHOUT PREJUDICE.**—Evidence as to obstructions contributing to the overflow, which were not within the issue as to damages, was without prejudice where no obstruction but the embankment itself was considered on the question of damages.
- ID.—MEASURE OF DAMAGES—COSTS NECESSARY TO PUT LAND IN REPAIR.**—The cost and expense of restoring the land to its former condition, and the loss sustained from being deprived of its use, were the measure of damages; and it was erroneous to admit evidence as to the costs necessary to put the land in repair. The rule of difference in market value is not invariably applied.
- ID.—MISTAKEN DESCRIPTION IN COMPLAINT AND FINDINGS—AVERMENT OF TRUE POSITION ADMITTED.**—Where there was a mistaken description of the land in the complaint as to legal subdivisions, as well as in the finding, which would indicate an incorrect position of the lands, yet where their true position is shown by an averment in the complaint, admitted by the answer, no finding is necessary in that regard, and the erroneous particular description may be ignored.
- ID.—INEFFECTUAL APPEAL FROM JUDGMENT—DISMISSAL.**—Where an attempted appeal from the judgment was not perfected until after the lapse of one year from the rendition of the judgment, it is ineffectual and must be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. J. S. Noyes, Judge presiding.

The facts are stated in the opinion of the court.

Earl Rogers, and H. C. Gooding, for Appellant.

John E. Daly, and E. W. Freeman, for Respondent.

ALLEN, J.—Appeal from an order denying defendant's motion for a new trial. The record discloses an attempt at appeal from the judgment, but inasmuch as the same was not perfected until after the lapse of one year from the rendition of judgment, the same is ineffectual and must be dismissed. Entertaining the views hereafter expressed, we may disregard the motion to dismiss the appeal from the order.

The only points in the record in this case here presented are that the evidence is not sufficient to justify the findings, and that errors of law warranting reversal of the order occurred at the trial.

As to the first point, while there is a conflict in many respects, there is evidence sufficient to support the findings. The findings and the evidence develop that the defendant's land adjoins the land of plaintiff on the east and is of a higher elevation than the land of plaintiff, and the water coming to said lands during rains flowed naturally westward in no definite channel, but widely and evenly diffused over the whole surface and doing no damage to plaintiff's land. The defendant, along his west line, being the dividing-line between the lands of plaintiff and defendant, constructed an embankment for use in the irrigating season, by which he could accumulate and retain the surplus irrigating water the better to utilize it in the irrigation of the trees growing upon the lower part of his premises. This embankment was permitted to remain during the entire irrigating season, and until, from heavy rains in November, 1902, large bodies of water fell upon defendant's lands and the lands above; that by reason of such embankment, the waters gathered upon the lands of defendant beyond the capacity of said embankment to hold, and the embankment broke away and the waters in separate channels were thrown upon plaintiff's land, tearing deep gullies therein, carrying off large bodies of soil and, in addition, certain fertilizers theretofore placed thereon. The court further finds that good husbandry did not require that said embankment be maintained; that said waters so accumulating were not the result of unprecedented storm, nor were the said rains of November, 1902, of an unusual character.

During the progress of the trial the court permitted the plaintiff to state his opinion as to whether such water would have been carried off had an outlet been made in the south end of the embankment. Assuming the objection of defendant to this evidence as well taken, and the opinion unwarranted, yet an examination of the whole answer shows that it contained a statement of the physical conditions surrounding the premises, upon which such opinion was based. The answer relieved itself from the force of the objection. (*People v. Wynn*, 133 Cal. 72, [65 Pac. 126].)

It is contended further that the court upon the trial erred in its admission of testimony in relation to certain obstructions existing on the north side of the street which contributed to the overflow on plaintiff's land. While under the pleadings it was not competent to show damages, other than those resulting from the obstruction complained of and specifically set forth, yet the court, by its finding, demonstrates that no obstructions other than the embankment were considered; and no prejudice, therefore, resulted from the introduction of such testimony.

We perceive no error in the admission of testimony as to the costs necessary to put the land in repair. In the similar case of *Sabine etc. Ry. Co. v. Joachimi*, 58 Tex. 456, it was held that the cost and expense of restoring the land to its former condition, and the loss sustained by being deprived of its use, constituted the measure of damages. While, as a general rule, the damages are to be measured by the difference in the market value before and after the injury, yet it is not invariably applied. It might prove oppressive. (Shearman & Redfield on Negligence, sec. 602.)

The principal contention of the appellant is that the evidence is insufficient to justify the decision, on the theory that the defendant in the construction of the embankment was but exercising rights and performing acts demanded by good husbandry in and about the cultivation of his own lands; that the embankment was not constructed for the purpose of diverting surface water, the result of rainfall, and that the proximate cause of the injury was an unprecedented and unlooked-for rain, which occurred before defendant had an opportunity to remove the embankment. As to all of these matters, other than the object of the original construction of the embankment and the time afforded to remove the same, the court has found against the defendant. Whatever may have been the moving purpose in constructing the embankment, or its maintenance, the effect was, in the event of heavy rainfall, to accumulate the water upon defendant's land; and should the embankment prove insecure and breaks occur therein, to cast the same in restricted areas across plaintiff's land, thereby working injury. In the case of surface waters having no definite channel of escape, and the owner of the land upon which they are found being impotent to rid

himself of their presence, the law wisely provides that the laws of nature should be left untrammelled in their disposition. (*Rudel v. Los Angeles County*, 118 Cal. 288, [50 Pac. 400]; *Ogburn v. Connor*, 46 Cal. 352, [13 Am. Rep. 213].) While it is true that one may occupy, use, and possess his own in a manner agreeable to himself, yet in the exercise of this right he may not do injury to his neighbor. The defendant possessed the right to construct this embankment, but in its construction he was bound to consider its effect upon his neighbor's land, in the event of heavy rains, which, from the testimony appear to be not infrequent in that locality. It is clear from the findings and from the testimony that he did not exercise the degree of care which was incumbent upon him in the maintenance of the embankment, either in its strength or providing outlets in the event of storm. Had proper outlets been provided, it is apparent that the time afforded to remove the embankment between the last irrigation and the commencement of the rains would not have been material. His neglect in regard to the manner of construction and failure to provide outlet for the water was the proximate cause of plaintiff's injury. Defendant, however, contends that the complaint being on account of negligence, and the findings being in line therewith, under the facts of the case the action was not one on account of negligence, but the act itself gave rise to the cause of action. And an effort is made to distinguish as between cases where the act is the basis of the action and those where negligence produces the injury. We are unable to appreciate the distinction between the two classes of cases in applying the rules laid down in this state in respect of the rights of the servient tenement in relation to surface waters naturally flowing over from the dominant tenement. The wrong having been committed, and consisting, as it did, in the neglect to provide proper outlets at appropriate places before the rainy season commenced, or before rains might reasonably be apprehended, we are unable to see how this distinction could avail, except, possibly, where the statute of limitations was involved.

It is further urged that it was error to refuse a new trial because it affirmatively appears by reading the description of the tracts in the complaint, as well as in the findings, wherein reference to their governmental subdivision is made,

that of necessity the lands of defendant would lie south of plaintiff's premises, and it would not be possible for the road or ditches complained of to extend along the northern boundary of both tracts. This is true; but the complaint avers that the parties own separate tracts of land, plaintiff's adjoining defendant's on the east, with a road extending along their northerly line, and this is not denied and no finding is necessary in that regard; and for the purposes of an action of this character is a sufficient description, if we ignore the erroneous particular description in the complaint.

Order affirmed.

Gray, P. J., and Smith, J., concurred.

[No. 24. Third Appellate District.—October 2, 1905.]

PETER MARTIN, Appellant, v. MARKARIAN AND COMPANY (a Corporation), Respondent.

APPEAL—ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE—

Where one of the grounds of the motion for a new trial was insufficiency of the evidence to justify the verdict, and the evidence is substantially conflicting, an order granting a new trial will not be set aside.

10.—REVIEW OF ORDER—GROUND EXPRESSED—APPELLATE COURT NOT LIMITED.—In reviewing the order granting a new trial this court is not limited to the ground expressed by the trial judge; but the order will be sustained upon any tenable ground assigned.

APPEAL from an order of the Superior Court of Fresno County granting a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

H. H. Welsh, and George Cosgrave, for Appellant.

F. H. Short, and A. M. Drew, for Respondent.

BUCKLES, J.—This is an action to recover the price of figs sold and delivered on August 19, 1903. The parties entered into the following written contract:—

"This certifies that Peter Martin has sold to Markarian & Company and Markarian & Company has bought all the White Adriatic Figs produced during the year 1903, on Gordon, Patterson, Grant Orchard Farm, F. Travers, Sanger, Gardenie, Harrison, C. Liman, Starwalt, and Beasley places, and estimated to be 100 tons.

"The seller, as a condition of sale, warrants all said fruit well cured and merchantable, and free from unmaturred fruit, and agrees that he will deliver said fruit to buyer at their packing house in Fresno, as fast as cured, said delivery to commence on or before Aug. 22d, 1903, and all fruit to be delivered by Nov. 1st, 1903. Until delivery is made, seller waives payment of purchase price, and assumes all risk of injury to or loss of said fruit.

"The buyer agrees to pay in cash at delivery for all figs delivered of quality and condition as above, and in lots as received, 3½ cents per pound and 50c per ton for hauling.

"This is intended to be and is an absolute sale, and title to said fruit has passed to buyer subject to foregoing conditions.

"Witness to mark and sig-

nature of Peter Martin,

"H. H. WELSH

his

"Seller PETER——MARTIN

mark.

"Markarian & Company,

"Dated Aug. 19, 1903.

"Per H. MARKARIAN.

"Witness, W. C. NIXON."

Some of the figs were then growing upon the trees. There is some confusion in the pleadings as to the amount of these dried figs which were delivered. The complaint alleges there were 71.1015 tons delivered and claims as a balance due the sum of \$435.91, while the answer denies that plaintiff delivered 66 1-6 tons of figs or any other number of tons or greater amount than 65 97-250 tons and denies that there remains due and unpaid plaintiff the sum of \$437.50 or any other sum.

The case was tried by a jury, which found a verdict for plaintiff for the sum of \$435, and judgment was rendered for plaintiff for that amount. A motion was made for a new trial on the grounds that the evidence is insufficient to justify the verdict; that said verdict is against law; that "on account of errors of law occurring at the trial and excepted to by the defendant" and on account of newly discovered evidence,

etc. The motion was granted and the appeal is from the order granting the motion, and it appears from what the trial judge said on the hearing of the motion that the same was granted "for the reasons, as well as others not here adverted to, the *verdict is against law* and should be set aside and a new trial granted." The written opinion of the trial judge is set out in appellant's reply brief.

The evidence is contained in the statement, and shows a substantial conflict in that which is most important and material, and this being a fact, under the well-established rule that the order granting a new trial will not be set aside when there is a substantial conflict in the evidence, the order should not be disturbed.

But appellant claims that the motion was not granted because the evidence did not support the verdict but because the trial court in passing on the motion said, "the sole question arising on this motion necessary to be considered is, Was there a delivery of the goods by the plaintiff and an acceptance of the same by the defendant?"

The defendant had, however, made its grounds of motion on other points as well, and the trial judge had no right to limit the grounds, and, indeed, the judge seems to have come to that conclusion, but he says at the end of his opinion, "For these reasons, as well as others not here adverted to," etc.

In *Churchill v. Flourney*, 127 Cal. 362, [59 Pac. 791], it was held that "this court is not confined to the ground on which the court below placed its order, for, as was said in *Kauffman v. Maier*, 94 Cal. 269, [29 Pac. 481], the court below 'cannot by stating in its order (and, we may add, or in its opinion) that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record.' " (See *Houghton v. Market-Street Ry. Co.*, *ante*, p. 576, [82 Pac. 972], No. 53, decided by first district court of appeal, September 15, 1905.)

The order is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

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[No. 71. Third Appellate District.—October 2, 1905.]

LEOPOLD MAIONCHI, Respondent, v. FLORINDO NICHOLINI, BEN NICHOLINI, J. CHAUVET, and H. J. CHAUVET, Appellants.

PLEADINGS—AMENDMENT OF COMPLAINT TO CONFORM TO PROOF—SERVICE AND FURTHER HEARING NOT REQUIRED.—Where, at the trial of an action, evidence is introduced which would support an amendment to the complaint germane to the cause of action, the court has power, after submission of the cause, to order immediate amendment to be made, so as to conform to the proof, without the necessity of service and further hearing.

ID.—AMENDMENT NOT GERMANE—ACTION TO RESCIND VOIDABLE CONTRACT—IMPROPER CHARGE OF VOID CONTRACT.—An action to rescind a contract for unfair advantage taken of plaintiff while an old man, enfeebled in mind and body, by a defendant in whom plaintiff had implicit confidence, proceeds upon the theory that the contract was not void, but voidable, and it was error, merely because admissible evidence of unsoundness of mind was introduced, to order an immediate amendment after submission, not germane to the cause of action, to charge that the contract was absolutely void, because made while plaintiff was entirely devoid of understanding.

ID.—CODE DISTINCTION BETWEEN VOID AND VOIDABLE CONTRACTS—JUDICIAL DECLARATION OF INCAPACITY.—Sections 38 and 39 of the Civil Code recognize and enforce the well-settled distinction between pleading and proof as to a void contract with a person judicially declared incompetent, and a voidable contract with a person of unsound mind, not entirely devoid of understanding, before incapacity is judicially determined.

ID.—UNSUPPORTED AMENDMENT AND FINDINGS.—Where there was no evidence that when the contract was made the plaintiff was entirely devoid of understanding, both the amendment and findings in favor thereof are unsupported by the evidence.

ID.—ABSENCE OF FINDINGS UPON ISSUES—JUDGMENT FOR RESCISSION UNSUPPORTED.—Though the evidence was sufficient to sustain a judgment for rescission, yet where the court failed to find upon issues of fact tendered by the answer upon the cause of action, a judgment for rescission cannot be supported.

APPEAL from a judgment of the Superior Court of Sonoma County and from orders denying a motion to strike out an amendment to the complaint and denying a new trial. Albert G. Burnett, Judge.

The facts are stated in the opinion of the court.

R. M. Swain, and Butts & Weske, for Appellants.

W. F. Cowan, R. A. Poppe, Ed. C. Barham, and J. A. Barham, for Respondent.

McLAUGHLIN, J.—It is alleged in the complaint herein, that on March 18, 1901, plaintiff was the owner and holder of a note for the sum of one thousand dollars executed and delivered to him by the defendants Chauvet, and that on said day he indorsed and delivered such note to defendant Florindo Nicholini; that at the time of such indorsement, “and for a long time prior thereto, and ever since, plaintiff has been an old and infirm man, enfeebled in mind and body, and unable to attend to his property interests or rights, and was and is very susceptible to the overtures of others and was and is easily influenced, and such weakness of mind was and is of such character and degree that plaintiff was and is unable to attend to any business affairs in which he is concerned without independent advice”; that plaintiff had implicit confidence and faith in each of the defendants Nicholini, and believed that they advised him in good faith and would protect him; that said defendants fraudulently procured and induced plaintiff to indorse and deliver said note under a promise that they would provide food, clothing, shelter, and the necessities of life for plaintiff during the remainder of his natural life; that plaintiff never received anything of value for said note, and “said defendants have not provided plaintiff with clothing, food, shelter or necessities of life.” The prayer was, “that said agreement be declared rescinded and said note and everything of value obtained from plaintiff as aforesaid be returned, and for costs, and that defendants be restrained from collecting the same, and for such other relief as is proper.” After the action was commenced plaintiff was adjudged insane and a guardian *ad litem* was appointed. The action was dismissed as to defendants Chauvet, and the other defendants answering denied all the averments of the complaint. The court found against the defendant Florindo Nicholini on the issues thus joined, and rendered judgment that plaintiff was “the owner of and entitled to the

possession of the said promissory note." From such judgment and the order denying his motion for a new trial defendant Florindo Nicholini appeals upon a bill of exceptions specifying particulars in which the evidence is insufficient to support the findings and containing many assignments of error. After the cause had been submitted for decision, and on the same day the findings and judgment were filed, without notice to appellant or his attorneys, the complaint was amended by inserting the following amendment: "That during all the times mentioned herein said plaintiff was of unsound mind and entirely without the capacity of understanding or comprehending the nature of said transaction and of the transactions in said complaint set forth, and that Florindo Nicholini knew and had knowledge of said facts and circumstances." The court found in accordance with such averment and after the judgment was entered the appellant in due time and form made his motion to strike out such amendment, and to set aside the finding and judgment on the grounds that said amendment was not served upon appellant or his attorneys, "and that the said amendment was not made to meet the proofs in said cause and was not justified thereby." The motion was denied, and appellant appeals from the order denying said motion. This appeal is supported by a separate bill of exceptions, and we think that the vital questions involved should be considered first.

Section 469 of the Code of Civil Procedure provides that "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits," and the next section provides that "Where the variance is not material, as provided in the last section, the court may direct the fact to be found *according to the evidence*, or may order an *immediate* amendment, without costs." Under these sections there can be no doubt that when evidence pro and con has been admitted touching a fact material to the cause of action stated in the complaint, the court may pursue either or both of the methods mentioned at any time before the rendition of judgment. And it is equally clear that the words "immediate amendment," by necessary implication, exclude the necessity for service and further hearing. "The law neither does nor requires an

idle act," and it would be idle to require service or a trial *de novo* when the subject-matter of the amendment had been gone into upon the trial, and it is only in such contingency that amendments to *conform to proof* can be allowed. (*Board of Directors v. Tregoe*, 88 Cal. 358, [26 Pac. 237]; *Firebaugh v. Burbank*, 121 Cal. 186, [53 Pac. 560]; *Lee v. Murphy*, 119 Cal. 364, [51 Pac. 549, 955]; *Herman v. Hecht*, 116 Cal. 559, [48 Pac. 611]; *Duke v. Huntington*, 130 Cal. 274, [62 Pac. 510]; *Jackson v. Jackson*, 94 Cal. 462, [29 Pac. 957].) The objection that "the amendment was not made to meet the proofs, and was not justified thereby," is so intimately connected with the point that the findings based on such amendment are not sustained by the evidence, that both of these contentions should be considered together. Sections 38 and 39 of the Civil Code emphasize the difference between contracts made by persons of unsound mind who are "*entirely without understanding*" and contracts by persons of unsound mind who are "*not entirely without understanding*," made before incapacity has been judicially determined. The plaintiff's incapacity was not judicially determined until March 12, 1904, nearly three years after the note was transferred, and this fact must be kept in mind in considering the question before us. A careful analysis of the averments of the complaint shows, beyond question, only a case of action to rescind a voidable contract. (*More v. Calkins*, 85 Cal. 188, [24 Pac. 729].) And a similar analysis of the amendment shows an averment rendering the contract absolutely void under said section 38. It is obvious that evidence that plaintiff was of unsound mind would be sufficient to support the allegations of the complaint, while something more, showing his entire want of understanding, would be essential to support the amendment. The importance of this distinction between averments and proof relating to *void* as distinguished from *voidable* contracts has been recognized in many well-considered cases, and such distinction cannot be ignored in reaching a correct solution of the problem under consideration. (*More v. Calkins*, 85 Cal. 190, [24 Pac. 729]; *Castro v. Geil*, 110 Cal. 296, [52 Am. St. Rep. 84, 42 Pac. 804]; *More v. More*, 133 Cal. 494, [65 Pac. 1044]; *Murphy v. Crowley*, 140 Cal. 150, [73 Pac. 820].)

Actions to rescind a contract are necessarily based on the theory that there is a contract binding upon the parties un-

less rescission is had. (Civ. Code, secs. 1688, 1689, 1691, 3406, 3408.) And the mere statement of this proposition should suffice to show that an amendment alleging, in effect, that there was no contract could hardly be germane to the original cause of action. But waiving this, and viewing this as an action to set aside or cancel the indorsement and to recover the note, still the amendment and finding cannot be justified or sustained. Granting the utmost weight to all evidence bearing on his mental capacity, it only shows that he was of unsound mind. There is not a scintilla of evidence showing that he was at any time entirely without understanding. He was called as a witness, and the examination to test his competency as such clearly indicates that he understood the questions and answered them quite as intelligently as could be expected of one whose knowledge of the English language was limited. The learned judge of the trial court believed him quite rational as to most subjects, and so stated. Indeed, his answers at that time, and even his self-serving declarations narrated by other witnesses, create a strong impression that he fully understood the transaction here assailed and only desired security for its faithful performance by Nicholini. The witnesses as to his sanity seemed to agree that his condition at the time of the trial was, to say the least, no better than it was at the time the agreement was made, and, if so, it certainly cannot be said that he was entirely lacking in understanding. As his incapacity had not been judicially determined at the time the contract was made, it follows from the foregoing that the amendment was unauthorized and that the finding based thereon is not sustained by the evidence. With this finding eliminated, the judgment, which was evidently based on the assumption that the agreement and indorsement were absolutely void, is unsupported by the findings. Even if it could be considered as a judgment for rescission, however, there is no finding as to facts essential to support such a judgment. (Civ. Code, secs. 39, 1691, 3408; *More v. Calkins*, 85 Cal. 190, [24 Pac. 729]; *Wilson v. Sturgis*, 71 Cal. 229, [16 Pac. 772]; *Marten v. Paul O. Burns Wine Co.*, 99 Cal. 357, [33 Pac. 1107]; *Southern Pacific R. R. Co. v. Choate*, 132 Cal. 280, [64 Pac. 292]; *Kelley v. Owens*, 120 Cal. 510, [47 Pac. 369, 52 Pac. 797].) And if there was such finding there is no evidence in the record

to support it. It could serve no useful purpose to consider other specifications or assignments, inasmuch as the objections urged may be obviated upon a retrial of the cause.

The judgment and order are reversed.

Chipman, P. J., and Buckles, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on October 30, 1905, and the following opinion was then rendered:—

McLAUGHLIN, J.—The earnestness and sincerity manifested by counsel for respondent in their petition for a rehearing herein has prompted a careful re-examination of all the evidence contained in the record. As counsel evidently misapprehend the decision rendered, we are admonished that perhaps it is not as clear as decisions of an appellate court should invariably be, and hence we deem it but just that an additional opinion be substituted for the terse formula usually adopted in passing upon such petitions. We did not intend to be understood as holding that there is no evidence to support a judgment of rescission. The evidence is entirely sufficient to do so. The judgment, however, is not that the contract be rescinded, the indorsements canceled, and the note restored, but “that the plaintiff is the owner of and entitled to the possession of” the note. Such judgment could only be based on the amendment and resultant finding, that plaintiff’s mental condition was such that, as a matter of law the transaction was an absolute nullity. If the judgment be considered as for rescission, however, it must fall because the court failed to find on issues pertinent to rescission tendered by the last three denials in the answer. (*More v. Calkins*, 85 Cal. 190, [24 Pac. 729].)

The evidence is ample to show that plaintiff was of unsound mind, and hence to render the contract *voidable* and subject to rescission under section 39 of the Civil Code.

Our re-examination but strengthens the conviction that there is *no* evidence to show such want of understanding as would render it *void* under the preceding section. The utmost that can be said of the evidence touching his condition

at the time of the transaction is that he did not *fully* understand the agreement or mode of carrying it into effect. The evidence hardly shows as much as was pleaded in *More v. Calkins*, 85 Cal. 182, [24 Pac. 729], or proven in *Castro v. Geil*, 110 Cal. 295, [52 Am. St. Rep. 84, 42 Pac. 804], and yet the court there held that such facts did not show such want of understanding as would render the contract *void*.

The rehearing is denied.

Buckles, J., and Chipman, P. J., concurred.

A petition to have the cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on December 1, 1905.

[No. 73. Third Appellate District.—October 4, 1905.]

ANDREW JORDAHL, Respondent, v. J. A. HAYDA et al,
Appellants.

INJUNCTION AGAINST LABOR UNION—INJURY TO RESTAURANT BUSINESS

—INTIMIDATION OF PATRONS—ABSENCE OF PHYSICAL FORCE—SUPPORT OF FINDINGS.—In an action to restrain the members and agents of a labor union from interfering with the plaintiff's business, by intimidation of patrons, findings that they have "interfered with and intimidated" the patrons of plaintiff's restaurant, and have "prevented" them from entering and patronizing the same, and have patrolled the sidewalk for the purpose of "driving customers away" therefrom, do not imply the use of physical force, and they are supported by evidence, which, though conflicting, tends to show conduct, short of physical force, amounting to intimidation of the patrons of plaintiff and to an unwarrantable interference with the peaceable prosecution of his business to plaintiff's pecuniary injury.

ID.—RIGHTS OF ORGANIZED LABOR.—Labor may organize for mutual benefit and self-protection, and organized labor has the right to effect its objects and purposes by all lawful means, lawfully exercised.

ID.—FREE SPEECH—PROPERTY RIGHTS—GUARANTIES OF CONSTITUTION—MAXIM—PROTECTION OF ALL CLASSES.—The right of free speech is guaranteed to all citizens by the constitution; but it also guarantees them the right of acquiring, possessing, and protecting property, and obtaining safety and happiness; and it is a maxim

of jurisprudence prescribed by law that "one must so use his rights as not to infringe upon the rights of another." These guaranties are equally important to and equally necessary for the protection of all classes of citizens.

Id.—ACTS ENJOINED—CERTAINTY OF JUDGMENT.—The court was not required in its judgment to enumerate the particular acts of intimidation enjoined, and where its meaning is plain, and it leaves to the members of the labor union as intelligent, law-abiding citizens to determine what they may safely do without violating its provisions, it is sufficiently certain.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Coonan & Kehoe, for Appellants.

Henry L. Ford, and George B. Collons, for Respondent.

CHIPMAN, P. J.—The defendants are members and agents of the Cooks and Waiters' Alliance, Local No. 220, of the city of Eureka, and plaintiff is the proprietor of the so-called Fairwind Restaurant at that city. The action is for an injunction restraining defendants "from the commission of any acts or the use of any methods within or in the immediate vicinity of the plaintiff's said restaurant and premises, which will tend to hinder, impede, or obstruct the plaintiff in the transaction of the business of said plaintiff at said Fairwind Restaurant in said premises, or hinder, intimidate or annoy the patrons or customers of plaintiff as they visit said restaurant and premises and depart from the same, and from annoying and intimidating persons who may desire to work in plaintiff's said premises." Plaintiff had judgment, from which defendants appeal, and from the order denying their motion for a new trial.

The brief of appellants is confined to a discussion of the alleged insufficiency of the evidence to sustain the findings. The particular parts of the findings thus attacked are quoted in the brief and are as follows: That defendants members of said association "have interfered with and intimidated persons who desired to visit said restaurant for the purpose of

patronizing the same, by telling them that they were making a mistake in patronizing said restaurant, and that nothing but a scab would go in there [meaning plaintiff's restaurant]; . . . that they would be sorry for themselves if they continued to patronize said restaurant, and thereby willfully and maliciously intimidated the patrons and intended patrons of said restaurant and caused them to refrain from patronizing said place of business," etc. (finding IV); that "the said defendant Harry Smith and other defendants have followed persons who intended to patronize plaintiff's said place of business and have prevented them from entering said place of business and patronizing the same" (finding V); that said defendants "willfully and maliciously patrolled the sidewalk in front of plaintiff's said place of business for the purpose of driving said customers or patrons away from said restaurant" (finding IV).

Appellants contend that the words used in the findings, such as "threats," "acts of intimidation," "interfered with," "driven away," or "prevented," as applied to the conduct of defendants toward the patrons of plaintiff, imply force, and that "the evidence does not warrant a finding that implies that force was used." We do not think these words as used in the findings and judgment imply that it was necessary to show physical force on the part of defendants toward any one. Persons might have been "prevented" from patronizing plaintiff, or "driven away" from his place of business or "interfered with" in an attempt to go into or out of his restaurant, by conduct falling short of actual violence, and yet the conduct might be of such character as to effect the object of defendants to the injury of plaintiff in a way which could not be adequately measured in an action for damages. We are cited by appellant to section 9 of article I of the constitution of California, which guarantees the right to every person to "freely speak, write, and publish his sentiments on all subjects," etc. It is argued that it is not unlawful for any person to go to or stay away from plaintiff's restaurant, and hence there could be nothing unlawful in any one of defendants requesting any patron of plaintiff's restaurant to remain away therefrom; that the motive of the person in making the request is immaterial; and if the request can be made of one it can be made of all patrons of plaintiff. Furthermore,

if this may be done verbally, it may be done in writing, and he may make the request on a banner such as was used in front of plaintiff's restaurant, which read: "Boycott—Fairwind Restaurant, declared an unfair restaurant by Cooks and Waiters' Alliance, Local No. 220. Public is asked not to patronize the place." It is also argued that "boycotting" is not actionable *per se*, and so with "picketing," and hence, as we infer, not restrainable by injunction. We do not find it necessary to enter upon a discussion of the right of labor to organize for mutual benefit and self-protection. All sane-thinking persons concede this right. And it cannot be doubted that organized labor has the right to effect its objects and purposes by all lawful means, lawfully exercised. Nor are we called upon to lay down general rules by which labor organizations should be governed in their relation to the business interests of the country and to society. We are to deal alone with the facts presented in this particular case, and the principles of law by which they shall be governed.

While the right of free speech is guaranteed to all citizens by the constitution, there is also guaranteed to them by the same constitution the right of "acquiring, possessing, and protecting property; and possessing and obtaining safety and happiness" (art. I, sec. 1); and it is a maxim of jurisprudence prescribed by the statute law of this state that "one must so use his rights as not to infringe upon the rights of another." (Civ. Code, sec. 3514.) These guaranties are equally important to and equally necessary for the protection of all classes of citizens. The difficulty in most cases is to apply the principles governing these correlated rights in particular cases as they arise. Appellants concede that boycotting and picketing may become "objectionable by reason of the acts done in prosecuting the boycott or in picketing," and, this much conceded, it follows that they may be resorted to by such unlawful means and in such reprehensible manner as to bring the persons therein engaged within the restraining power of the courts. That a boycott was declared and being enforced against plaintiff by defendants is not disputed. One of the defendants testified to its object as follows: "We wanted to keep people from patronizing Mr. Jordahl's while he refrained from getting a union card. We wanted to keep everybody from patronizing him as much as we could. It

did not matter who it was, everybody we could keep from patronizing him we would do the best we could to keep them away. If Mr. Jordahl had come in and acceded to our terms that minute the boycott would have been declared off; and would have been kept on as long as he wouldn't had it not been for the injunction of the court. The boycott would have been on now if it had not been for the injunction of the court. I was a member of the committee that had exclusive power to act in this particular matter." The evidence was conflicting as to the acts which the court found amounted to intimidation of the patrons of plaintiff and to an unwarrantable interference with the peaceable prosecution of his business and to plaintiff's pecuniary injury. The well-settled rule of the supreme court, which therefore must be followed by this court, is, that the findings of the trial court will not be disturbed, but must be accepted, where there is a substantial conflict in the evidence. And under this rule the appellate court is not permitted to determine where the preponderance of the evidence rests. If there was any substantial evidence to support the findings we must hold it sufficient. The responsibility of weighing the evidence is upon the trial court or the jury, where the trial is by jury. Upon a careful examination of the record we think there is sufficient to sustain the findings. We do not understand that the trial court decided that carrying a banner, such as was carried in this instance, in the street in front of plaintiff's restaurant, was unlawful or that the judgment necessarily rested on such acts, and no question involving such acts is before us. The judgment enjoins defendants "from stationing themselves in the doorway of said restaurant or upon the sidewalk in front of the same and there interfering with the business of plaintiff by intimidation, insults, or threats to his patrons, thereby inducing persons not to patronize the restaurant of said plaintiff; and said defendants, . . . are hereby especially enjoined from in any manner interfering with the said business of plaintiff by means of threats or intimidation of any kind or nature, directed against the patrons or customers . . . of said plaintiff and from interfering by means of threats or intimidation with any person that may be working for plaintiff or may desire to work for him in his said restaurant."

Appellants finally complain that the judgment should be reversed because "it is so indefinite and uncertain that it is

impossible to ascertain therefrom what acts defendants are enjoined from performing." The court was not called upon nor was it practicable to enumerate the particular acts which in its opinion would be regarded as acts of intimidation to customers or threats used for the purpose of diverting patrons from plaintiff's restaurant. Defendants are presumed to be intelligent and law-abiding citizens and, as such citizens, the court was content to leave to them the determination of what particular acts they could in future safely resort to without violation of its directions. The meaning of the judgment is plain enough, and so long as defendants keep within the intention expressed by the court they will be within their rights so far as any violation of this judgment may be involved.

The judgment and order are affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 77. First Appellate District.—October 4, 1905.]

JAMES J. WHELAN, Respondent, v. JOHN H. ROSSITER,
Appellant.

VENDOR AND PURCHASER—CONTRACT FOR PERFECT TITLE—AGREEMENT FOR BUILDING RESTRICTIONS—ENCUMBRANCES—PERSONAL COVENANT—ENFORCEMENT IN EQUITY.—Under a contract for the sale of land calling for a perfect title, a recorded agreement imposing building restrictions upon the land shows an encumbrance upon the title, and even if the covenant be a personal one, though assuming to bind all representatives, yet being such as a court of equity might enforce against purchasers with notice, the purchaser was justified in declining to accept the title.

ID.—TITLE TO BE DEDUCIBLE OF RECORD—RIGHTS OF PURCHASER.—Under a contract for a perfect title, the purchaser is entitled to one which is fairly deducible of record, free from all reasonable doubt and exposure to litigation; and he is not required to make investigation as to facts *aliunde* that may affect the title, not disclosed by the abstract, furnished by the vendor, or actually known to the purchaser.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

John S. Drum, and Goodfellow & Eells, for Appellant.

Joseph Hutchinson, for Respondent.

HALL, J.—This is an appeal upon the judgment-roll from a judgment in favor of plaintiff whereby he recovered two thousand dollars, deposit on a contract for sale of a piece of real estate. By the terms of the contract fifteen days were allowed to examine title, and if found defective, purchaser was to state his objections in writing, and seller was to have a reasonable time to perfect title. Abstract of title to be furnished by seller. The abstract was furnished by defendant, and in due time plaintiff in writing specified to defendant his objections to the title, and thereafter defendant announced to plaintiff that he could not remove the restrictions and encumbrances upon said title complained of, and plaintiff thereupon demanded the return of his deposit, and on refusal brought this action.

The contract was dated February 18, 1901.

The objections to the title were as follows: It appeared from the abstract that, on the twenty-sixth day of August, 1874, all the then owners in fee, as tenants in common of all of Western Addition block 689, in which the property described in the contract is situated, and also of the adjoining blocks 684, 702, 703, and part of 685, entered into an agreement in writing, in and by which, for the express purpose therein stated of directly benefiting all of said property and enhancing the value of all of said lands, they covenanted and agreed as follows:—

1. That no buildings were to be erected upon any part of said lands except for private residences;
2. That no building, or any part thereof, erected upon any part of said premises should be used or occupied as a blacksmith or other shop, or as a grocery store, or saloon, or place of public amusement;
3. That no buildings or superstructure erected upon any part of said lands, except fences should be built within twenty feet of the street;
4. That no alleyway or private street should be opened through any portion of said lands.

By said agreement all the covenants thereof were expressly made binding upon all the parties thereto, their heirs, executors, administrators, and assigns, and any and all persons who claimed or derived their title or possession through any of the parties to said agreement; and said agreement further provided for injunction suits and suits for damages in case of violation.

The agreement was recorded April 3, 1877.

On the eighteenth day of November, 1898, defendant joined with other parties then interested in a portion of said block in an action in the superior court of the city and county of San Francisco, for the purpose of declaring invalid and canceling said agreement, on the ground that the same constituted a cloud or encumbrance upon said property. The complaint alleges that "said writing is a cloud upon the title of said plaintiffs to the lands owned by them, . . . and the so-called covenants contained in said writing . . . greatly interfere with and hinder the sale of said lands and the obtaining of loans upon mortgages upon said lands, and largely detract from the value of said lands." The prayer was to quiet title.

The defendant in said action answered, and set up said agreement, and claimed that the same was legal and valid according to its terms. In that action judgment went for plaintiff January 29, 1901, but defendant therein perfected an appeal to the supreme court, which was pending at the time of the trial of this present action.

Defendant deraigned title from some but not all of the parties to said agreement.

It appeared of record in the county recorder's office, but not by said abstract, that one of the owners signing said agreement had, before the signing thereof, mortgaged his property, and that the mortgagee had foreclosed and obtained a title free from the effect of such agreement, and after the date of said agreement, but before the recordation thereof, others of the owners had made conveyances of lands for value.

Appellant insists that, notwithstanding the agreement above referred to, and the litigation concerning it then actually pending, the title to the lot was not defective. In this regard it is insisted that the covenants in said agreement are

not such as run with the land (Civ. Code, secs. 1460-1462), and therefore do not affect the title to the land.

But a purchaser of land under a contract calling for a perfect title, or a title free from defects, is entitled to a title that is fairly deducible of record, free from reasonable doubt and litigation. (*Muller v. Palmer*, 144 Cal. 305, [77 Pac. 954]; *Turner v. McDonald*, 76 Cal. 177, [9 Am. St. Rep. 189, 18 Pac. 262]; *Reynolds v. Burrell*, 86 Cal. 538, [25 Pac. 67].)

Building restrictions and the like contained in grants of real estate are encumbrances on the title. (*Reynolds v. Cleary*, 61 Hun, 592; *Wetmore v. Bruce*, 118 N. Y. 319, [23 N. E. 303]; *Kramer v. Carter*, 136 Mass. 504; *Jeffries v. Jeffries*, 117 Mass. 184; *Van Schaick v. Lese*, [31 Misc. 610], 66 N. Y. Supp. 64; 29 Am. & Eng. Ency. of Law, 612.)

In *Wetmore v. Bruce* it is said, "It is entirely competent for adjoining owners of land by grant to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings. The covenants being mutual and imposing such restrictions in perpetuity are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises. Observance of such covenants will be enforced by a court of equity."

The fact that the covenants do not run with the land is not the test as to whether a title is good. In some cases equity will enforce personal covenants. In the Law of Real Property in Conveyancing (Jones) it is said: "One who takes land with notice of a restrictive agreement affecting it cannot equitably refuse to perform it, though the agreement may not be a covenant which runs with the land, or creates a technical qualification of the estate conveyed." The author also quotes from *Whitney v. Union Railway Co.*, 11 Gray, 359, [71 Am. Dec. 715], where it is said: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant, or agreement, will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform."

To the same effect is *Tulk v. Moxhay*, 2 Phil. 774, 13 Jur. 89, 18 L. J. N. S. Ch. 83.

In *Los Angeles etc. Co. v. Muir*, 136 Cal. 36, [68 Pac. 308], it was conceded that there are personal covenants enforceable in equity against the grantee of the covenantor.

Thus we see that, notwithstanding that under the Civil Code the covenants in the agreement may not run with the land, there is authority for the contention that a vendee of the land with notice could be compelled to perform them.

The title offered in this case was therefore one that was exposed to litigation (in fact, litigation concerning it was then pending), and was therefore doubtful.

In *Swayne v. Lyon*, 67 Pa. St. 436, it is held that a title is not good or marketable that exposes the vendee to litigation. In this case the doubt as to the title concerned a matter of law.

Every title is doubtful which invites or exposes the party holding it to litigation. (*Speakman v. Fouepaugh*, 44 Pa. St. 363; *Reighard's Estate*, 192 Pa. St. 111, [43 Atl. 413]; *Michenor v. Reinach*, 49 La. Ann. 360, [21 South. 552].)

In *Herman v. Somers*, 158 Pa. St. 424, [38 Am. St. Rep. 851, 27 Atl. 1050], it is said: "In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact."

In *Spencer v. Sandusky*, 46 W. Va. 582, [33 S. E. 221], it was held that a vendee for value purchasing a good title cannot be compelled to accept a litigious or clouded title, if there is reasonable ground to apprehend litigation with regard thereto, although the same may be satisfactory to a lawyer or speculator.

In *Fleming v. Burnham*, 100 N. Y. 1, [2 N. E. 905], it was held that a purchaser of a good title will not be required to determine a disputed question of fact or a doubtful question of law with reference thereto.

In *Daniel v. Shaw*, 166 Mass. 582, [44 N. E. 991], the freedom of the vendor's title from encumbrances depended on the constitutionality or unconstitutionality of a certain statute, and the court said: "The plaintiff concedes that his title is not good if the statute is constitutional. The parties also differ in their construction of the statute. The city of Boston is interested in both of these questions. It has been allowed

to file a brief, but it is not a party to the record, and would not be precluded from litigating the same questions anew if an opinion in the present case were for the plaintiff. The defendant would be exposed to the chance of such litigation if compelled to accept the title now offered. . . . The plaintiff asks us to declare his title good by declaring the statute unconstitutional. The defendant ought not to be compelled to accept such a title,"—and cited *Jeffries v. Jeffries*, 117 Mass. 184; *Chesman v. Cummings*, 142 Mass. 65, [7 N. E. 13]; *Hunting v. Damon*, 160 Mass. 441, [35 N. E. 1064]; *Abbott v. James*, 111 N. Y. 673, [19 N. E. 434]; *Fleming v. Burnham*, 100 N. Y. 1, [2 N. E. 905].

At the time of the execution of the contract of sale which gives rise to this litigation there was litigation actually pending concerning the validity and effect of the agreement affecting the land sold. We cannot under the authorities say that the questions of law involved were so free from doubt that the vendee should decide them at his peril. If he had completed the purchase he would have been obliged to proceed with the litigation, probably employ counsel at much expense, or take the chances of an adverse result in the supreme court.

We have not overlooked the claim made by appellant that by reason of matters appearing of record, but not shown in the abstract, the agreement had become of no effect. Aside from the consideration that litigation was actually pending affecting the validity of the agreement, we do not think that a purchaser is required to make investigations as to facts that may affect the title, not disclosed by the abstract, furnished under the contract, by the vendor or actually known to the vendee. (*Smith v. Taylor*, 82 Cal. 533, [23 Pac. 217].)

For the reasons above set forth the judgment is affirmed.

Cooper, J., and Harrison, P. J., concurred.

[No. 57. Third Appellate District.—October 5, 1905.]

RUSSELL-VAIL ENGINEERING COMPANY, Copartners,
Appellants, v. G. W. KIRBY, County Treasurer of
Merced County, Respondent.

TWO CONTRACTS WITH COUNTY—CLAIM AND PAYMENT UPON ONE—ESTOPPEL OF CLAIMANT—MANDAMUS.—Where the same company had two contracts with a county, one of an earlier date for a heating plant, and one of later date for a ventilating plant, for the county hospital, and a verified claim upon the heating plant was allowed and paid, the company is estopped from showing that the amount received upon its verified claim was not a payment upon the heating plant, and was intended to be a claim upon the ventilating plant, and *mandamus* will not lie to compel a first payment upon the heating plant.

ID.—SUPPORT OF JUDGMENT—REFUSAL OF MANDAMUS—QUESTIONS NOT CONSIDERED.—Where the findings support the judgment refusing the writ of mandate, this court will affirm it without inquiring as to the validity or effect of either of the contracts, or the relation between them.

APPEAL from a judgment of the Superior Court of Merced County. E. N. Restor, Judge.

The facts are stated in the opinion of the court.

Budd & Thompson, and T. C. Law, for Appellants.

F. W. Henderson, for Respondent.

Chickering & Gregory, Amicus Curia.

BUCKLES, J.—This is an application for a writ of mandate against the county treasurer of Merced County, to compel him to pay a warrant to plaintiffs for work, etc., done under a contract with the board of supervisors, amounting to the sum of \$1687.50.

The case comes up on the judgment-roll, and the facts appear to be as follows:—

On June 6, 1903, petitioners entered into a contract with the board of supervisors to install a heating plant in the county hospital, then in course of erection, for the sum of

\$2,250, to be paid as follows: On July 31st, seventy-five per cent of the cost of all labor and material then furnished. Other payments were to follow in like manner.

On August 15th petitioners entered into another contract with said board to install in said building a ventilating plant for which petitioners were to receive \$3,988. On September 17, 1903, petitioners presented a demand against Merced County in due form and duly verified, which claim or demand is as follows:—

“Demand of Russell-Vail Engineering Co. on the treasury of the county of Merced, state of California, for the sum of two thousand dollars, being for part payment for heating system.

“Sept. 17, 1903. Part payment on heating system, Co. Hospital, \$2000.00.”

This claim was allowed September 21, 1903, the county warrant issued and presented to the county treasurer for payment on September 24th, and indorsed “not paid for want of funds.” On December 11, 1903, it was again presented and was paid.

On November 5, 1903, the demand which is the subject of this action was presented to the said board, and is as follows:—

“Demand of Russell-Vail Engineering Co. on the treasury of the county of Merced, state of California, for the sum of sixteen hundred and eighty-seven and 50-100 dollars, being for heating plant contract at county hospital.

“November 4th, first payment on account of contract for installing of steam heating plant at county hospital, \$1687.50.”

This demand was for seventy-five per cent of the actual cost of labor and material furnished up to July 31, 1903. under the provisions of the contract of June 6, 1903. The claim was duly sworn to, and on the eleventh day of November the board allowed it. The auditor drew his warrant, which was presented to the treasurer and on November 16th was indorsed, “Not paid for want of funds.” The warrant was presented again on January 4, 1904, when it is admitted there were funds on hand sufficient to pay it, but payment was refused.

The trial court found the facts as above stated, and found further that petitioners intended said two-thousand-dollar

claim to be a payment on the contract of August 15th, and that it was a claim on said ventilation contract, and that the county treasurer had paid the same, believing it to be a claim founded on said ventilating contract on June 6, 1903.

As conclusions of law the court found that appellants were estopped from showing that their verified claim for two thousand dollars was and is not a payment on the contract for the heating plant.

We think the conclusion just mentioned and the findings upon which it is based support the judgment, and without intimating any opinion as to whether the county is estopped to question the validity of the contract, or whether the board should have advertised for plans and specifications, or whether the heating plant comes within the provisions of subdivision 8 of section 25 of the County Government Act of 1897, so as to require thirty days' notice for bids, and basing our opinion on the one ground that the findings above mentioned support the judgment, we affirm the judgment.

McLaughlin, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 3, 1905, and the following opinion was then rendered:—

BUCKLES, J.—Application for rehearing. We have gone carefully over our opinion rendered herein, and reviewed the facts in the case, and considered the matters suggested in the petition herein, and can see no reason for granting a rehearing.

If true as alleged that the heating contract was extended and made a part of the ventilating plant, and plaintiff was to have \$2,250 for the heating plant and \$3,988 for the ventilating plant, making \$6,238 for both contracts, and it having received two thousand dollars thereon, or on either of the contracts, there would remain due from the county the sum of \$4,238. And still we do not pass upon the validity of either contract.

We are still of the opinion that the findings support the judgment rendered in the court below.

Rehearing is denied.

McLaughlin, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on December 4, 1905.

[No. 73. Second Appellate District.—October 7, 1905.]

H. E. DOWNING, Respondent, v. D. F. DONEGAN, and
HELEN DONEGAN, Appellants.

ACTION UPON NOTE—EQUITABLE DEFENSE—SUFFICIENCY OF FINDINGS—OMISSION—PRESUMPTION.—In an action upon a note where all other issues were sufficiently covered by the findings, the omission to find upon an equitable defense pleaded in the answer will not have the effect to invalidate the judgment for the plaintiff where it does not appear by the statement or bill of exceptions that evidence was submitted in relation to such issue; but it must be presumed in such case that there was no evidence to support it.

ID.—EXCESS IN AMOUNT FOUND DUE—COLLATERAL SECURITY—PRINCIPAL DEBT—MODIFICATION OF JUDGMENT.—Where it appears that the note in suit was given as collateral security, the amount recoverable thereupon cannot exceed the principal debt; and where the findings show an excess in the amount found due above that debt, that judgment must be modified accordingly.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Charles H. McFarland, for Appellants.

Bernard Potter, for Respondent.

SMITH, J.—Appeal from a judgment for the plaintiff. This is a suit by the assignee of a note of date May 9, 1898, executed by the defendants to one Joyce, the plaintiff's assignor, for the sum of twelve hundred dollars, with interest at the rate of eight per cent per annum from date, com-

pounded quarterly. The complaint alleges that no part of said promissory note, or the interest thereon, has been paid, and that the amount thereof, with interest, is now due and owing from the defendants. The answer denies these allegations, or that there is due to the plaintiff the amount claimed or any amount, and further alleges that the amount mentioned in the note, with interest, has been fully paid and discharged. There is also what is called a "supplemental and amendatory and additional answer," alleging that the note executed to Joyce was secured by a chattel mortgage upon certain horses; and also setting up the equitable defense stated below. This document, as it is written, is without coherence or sense, by reason of the words "plaintiff" and "plaintiff and his wife" being written therein, instead of the words "defendant" and "defendant and his wife,"—which were plainly intended. Correcting it in this respect, it appears from the allegations therein contained that certain lands of the defendants mortgaged to one Hawkinson had been sold under foreclosure to the mortgagee, and that there was an agreement between defendant and Joyce for the latter to redeem from the sale, and thus to acquire title and to hold the same as an additional security for the note in suit and the money paid by him for redemption. It is further alleged that Joyce sold the property for the sum of sixty-five hundred dollars, which he has kept for his own use. It does not appear what amount was paid by Joyce for the redemption. But it is alleged, in effect, that at the time of the sale the amount due on the note did not exceed the sum of five hundred dollars, and that the proceeds of the sale were sufficient to satisfy the defendant's indebtedness to the plaintiff, and leave the latter indebted to the former; and, in the absence of special demurrer, this must be regarded as sufficient.

The findings of the court are, in effect: That the note sued on was executed by the defendants to Joyce as *collateral security* for the payment of a note previously executed to him by the defendant Donegan for the sum of two thousand dollars, of date June 1, 1897; that some months prior to the execution of the note sued on (March 5, 1898) there was an account stated between Joyce and Donegan, showing a balance on the older note of \$1,448, bearing interest at the rate of eight per cent per annum; "that on the 26th day of Novem-

ber, 1900, the sum of \$660, and no more, was paid on account of said amount due, as per said account stated"; and "that the amount of the principal and interest now due and unpaid, according to the terms of said account stated, and the said note sued upon herein, is \$1,416.62"; for which amount judgment was entered.

The several objections urged by the appellants to the judgment are, in effect: That the court has failed to find upon the issues raised by the "amendatory answer"; also, that it has failed to find on the issue as to payment raised by the original answer; and that the actual findings on which the judgment is based are outside the issues in the case.

As to the issues referred to in the first point, there is obviously no finding; and the only question, therefore, is whether the case is one in which it is to be presumed, in support of the judgment, that there was no evidence on those issues. The rule on this point, as expressed in the leading case,—after very careful consideration,—is: "The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it, but a failure to find upon some issue, a finding upon which would simply have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." (*Himmelman v. Henry*, 84 Cal. 106, 107, [23 Pac. 1098]; *Winslow v. Gohransen*, 88 Cal. 451, [26 Pac. 504]; *Dolliver v. Dolliver*, 94 Cal. 646, [30 Pac. 4]; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 621, [30 Pac. 783], Paterson, J.; *Estate of Carpenter*, 127 Cal. 587, [60 Pac. 162]; *Eva v. Symons*, 145 Cal. 205, [78 Pac. 648].) The rule is stated somewhat more broadly in some other cases, but what is said by the court must be construed with reference to the facts involved, which were such as to bring the cases within the application of the rule as originally expressed. (*Woodham v. Cline*, 130 Cal. 499, [62 Pac. 398]; *De Tolna v. De Tolna*, 135 Cal. 578, [67 Pac. 1045]; *Horwege v. Sage*, 137 Cal. 539, [70 Pac. 631].)

The rule is to be understood, therefore, as applying only to cases where there are findings sufficient to support the judgment. Nor can it well be carried further without abrogating altogether the provisions of sections 632 and 634 of the Code

of Civil Procedure, and restoring the law to what it was under the statutory provisions previously existing, which those sections were enacted to repeal. (Practice Act, sec. 180.) The actual question involved, therefore, is whether there is a sufficient finding on the issue of payment made by the allegations of the complaint and the denials of the answer—the other allegations of the complaint being admitted. On this issue, indeed, the burden of proof was on the defendants; but it will be assumed for the purposes of this decision that a finding upon the issue was necessary. (*Estate of Carpenter*, 127 Cal. 587, [60 Pac. 162].) On this question the findings are somewhat complicated, but it is found, in effect, that the only payment made upon the note in suit was the sum of \$660, paid November 23, 1900, on the original indebtedness. For this the note in suit was given as collateral, and all that can be recovered is the principal debt. Calculating the amount due upon this, with simple interest at eight per cent per annum to the date of credit, the amount due thereon, and consequently on the note in suit, would be \$1,103.34; and this, with simple interest at the rate of eight per cent per annum, would amount at the date of the finding to the sum of \$1,364.46; which is \$52.16 less than the amount found to be due. The issue of payment seems, therefore, to have been fully disposed of. The amount found to be due, indeed, is \$52.16 in excess of the amount shown by the facts found, but this error can be cured by modifying the judgment.

With regard to the equitable defense set up, it must be presumed, therefore, there was no evidence offered to support it.

As to the third point, the findings seem to touch upon points outside of the issues, but the facts found are pertinent to the ultimate issue as to payment, and all that can be objected to them is that the court, or the counsel who drew them, pursued an unnecessarily roundabout way of disposing of that issue.

The case is remanded to the lower court, with directions to modify the judgment as above indicated; and as thus modified it will stand affirmed.

Allen, J., concurred.

GRAY, P. J., concurring.—I concur in the judgment for the following reasons:—

The due execution of the note in suit, and its assignment to plaintiff, and that the latter is the "owner and holder" thereof, is admitted by the defendants' failure to deny the same. Inasmuch as the execution of the note and ownership in plaintiff were admitted by the pleadings, if the case had been submitted without any evidence the plaintiff would have been entitled to a judgment for the principal and interest of his note. The burden was on defendants to prove their affirmative defense as to the trust fund. It was also on them to prove their affirmative defense of payment. It is held that while the plaintiff must allege nonpayment in his complaint, yet he need not prove this negative allegation, but the defendant must prove payment, if he relies upon it as a defense. The admission of the execution and ownership of the note established an indebtedness, and such indebtedness would be presumed to continue until it was shown to have been extinguished. (*Melone v. Ruffino*, 129 Cal. 514, [74 Am. St. Rep. 127, 62 Pac. 93]; *Thompson v. Thompson*, 140 Cal. 545, [74 Pac. 21].)

There being no evidence in the record, it is impossible for us to determine whether payment or the other affirmative defense was established at the trial, and unless we can determine from the record that there was evidence given necessitating findings in defendants' favor upon those defenses we cannot disturb the judgment for want of such findings. It will be presumed in support of the judgment that there was no evidence offered in support of those affirmative defenses. (*De Tolna v. De Tolna*, 135 Cal. 575, [67 Pac. 1045]; *Woodham v. Cline*, 130 Cal. 497, [62 Pac. 398]; *Winslow v. Gohransen*, 88 Cal. 450, [26 Pac. 504].) "The rule, then, is that an appellant from a judgment against him in the court below will not be heard to complain that the court failed to find upon some issue tendered by him, unless he brings up the evidence and thereby shows that he litigated that issue in the trial court and introduced evidence upon the issue which would have justified a finding in his favor. One reason for this rule is that, since he had the affirmative upon that issue, if he introduced no evidence, the finding would necessarily have been against him, and, therefore, he is not injured by

the failure of the court to make a finding." (*Estate of Carpenter*, 127 Cal. 587, [60 Pac. 162]; *Eva v. Symons*, 145 Cal. 202, [78 Pac. 648].)

Of course, a finding as to what was "due on the note" would have been a mere conclusion of law and entirely unnecessary. The amount due is a mere matter of calculation on the face of the note, the due execution of which and assignment to and consequent ownership in the plaintiff have been admitted by the pleadings. Of course, the defendants cannot be heard to complain that the judgment against them is for less than such computation shows to be due.

Appellants also complain that the findings of the court were entirely outside the issues, and this seems to be the fact. But such findings should be entirely disregarded, and cannot be ground for reversal. The judgment is within the case as made by the complaint, and rests for support on the admission of the answer that the note was duly executed and is now in the hands of the plaintiff as the owner thereof; and these findings outside the issues are entirely unnecessary to the support of the judgment, and may be treated as mere surplusage.

I am therefore of opinion that the judgment should be affirmed as it stands, and upon this I concur in the judgment as reduced, upon the theory that the greater includes the less.

[No. 190. First Appellate District.—October 10, 1905.]

REBECCA G. WHITE, Respondent, v. ANNA GAFFNEY,
Appellant.

**ACTION TO ABATE NUISANCE—JUDGMENT—COSTS AND COUNSEL FEES—
SUBSEQUENT ABATEMENT—APPELLATE JURISDICTION.**—This court has appellate jurisdiction in an action to abate a nuisance; and where the judgment includes costs and counsel fees, and they have not been paid, the abatement of the nuisance in fact does not satisfy the judgment nor deprive this court of appellate jurisdiction over it to determine any question involved therein, including the propriety of the allowance of costs and counsel fees, though less than three hundred dollars in amount; and a motion to dismiss such appeal will be denied.

MOTION to dismiss appeal from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

John C. Partridge, for Appellant.

Sooy & Dorn, for Respondent.

HALL, J.—This is a motion by respondent to dismiss an appeal taken by defendant from a judgment in favor of plaintiff and against defendant, directing that defendant abate a certain nuisance, and further adjudging that plaintiff have and recover of and from defendant the sum of \$292.50 as and for costs, expenses, and counsel fees incurred in the prosecution of said action.

Counsel for plaintiff insist that defendant having since the judgment abated the nuisance the judgment has been complied with (although the costs and counsel fees have not been paid), and that defendant cannot be heard to question the allowance of the costs and counsel fees, as costs and counsel fees are mere incidents of the judgment.

There is no merit in this contention. We do not conceive that even counsel for plaintiff will admit that the abatement of the nuisance satisfies the judgment for costs and counsel fees. If we should grant his motion and dismiss this appeal, we have no doubt that when he applies to the clerk of the trial court for a writ of execution to collect the judgment for costs and counsel fees, he will insist that it is a very important and substantial part of the judgment remaining unsatisfied. Certain it is that if the defendant be finally compelled by a writ of execution, or otherwise, to pay this judgment, she will have a realizing sense of its substance and importance.

That part of the judgment awarding costs and counsel fees is as much a part of the judgment, subject to review on appeal from the judgment, as any other part of it. We are not now discussing an order of the court taxing costs on a disputed cost bill filed subsequent to a judgment awarding costs, but we are discussing the judgment itself that awards costs and counsel fees.

The cases are numerous where, on an appeal from a judgment awarding costs, the appellate court has reviewed and modified the judgment in that respect. We will cite but a few: *Schmidt v. Klotz*, 130 Cal. 223, [62 Pac. 470]; *Quitow v. Perrin*, 120 Cal. 255, [52 Pac. 632]; *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, [16 Pac. 390]; *People v. Campbell*, 138 Cal. 11 (23), [70 Pac. 918]; *Benson v. Braun*, 134 Cal. 41, [66 Pac. 1]; *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, [54 Pac. 731]; *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 542, [78 Pac. 7].

In *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 565, [16 Pac. 390], the appeal was taken only from that part of the judgment awarding costs to plaintiff, and that part only of the judgment was reversed.

In *Schmidt v. Klotz*, 130 Cal. 223, [62 Pac. 470], the judgment was modified in regard to costs on an appeal from the judgment, which, in this regard, was erroneous on its face. The same is true in *Quitow v. Perrin*, 120 Cal. 255, [52 Pac. 632]; *Benson v. Braun*, 134 Cal. 41, [66 Pac. 1], and *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, [54 Pac. 731]. Where the judgment on its face shows that costs and counsel fees have been awarded contrary to the law, no bill of exceptions is necessary, as the question is presented by the judgment-roll.

It is also insisted that no appeal lies in this case for the reason that the only matter now involved is less than three hundred dollars. This matter has been finally settled in this state contrary to the contention of the plaintiff in *Harron v. Harron*, 123 Cal. 508, [56 Pac. 334], which reviews and overrules preceding cases relied on by plaintiff. See, also, *Southern California Ry. Co. v. Superior Court*, 127 Cal. 417, [59 Pac. 789]. *Harron v. Harron* was an action for divorce, and it was held that as the constitution gave appellate jurisdiction to the supreme court in such actions, a motion to dismiss an appeal from an order allowing one hundred and forty dollars for costs and counsel fees would not lie.

The constitution gives this court appellate jurisdiction in actions to abate a nuisance. This gives us appellate jurisdiction over the whole and every part of the judgment in such an action.

The motion to dismiss the appeal is denied.

Cooper, J., and Harrison, P. J., concurred.

[No. 64. First Appellate District.—October 10, 1905.]

ANNIE BLACK, Administratrix, etc., Appellant, v. VERMONT MARBLE COMPANY, Respondent.

ACTION AGAINST FOREIGN CORPORATION—STATUTE OF LIMITATIONS—

FAILURE TO DESIGNATE AGENT.—Under the act of 1872, and the act of 1899 amendatory thereof, a foreign corporation doing business in this state which fails to file with the secretary of state its designation of some person residing in the county of its principal place of business upon whom process shall be served cannot defend an action on the ground that it is barred by the statute of limitations.

ID.—PLEA OF STATUTE—ADMISSION OF PLEADINGS—BURDEN OF PROOF.

—Where it was admitted by the pleadings that defendant is a foreign corporation, and it pleaded the statute of limitations, the plea being deemed controverted by section 462 of the Code of Civil Procedure, the burden is upon the defendant in order to avail itself of the defense to show that it had complied with the statute by filing the required designation with the secretary of state.

ID.—DESIGNATION PENDING SUIT—PROTECTION OF STATUTE—TIME OF

RUNNING.—Where the foreign corporation designated an agent pending suit, such designation is only prospective from its date as to the protection of the statute of limitations, and it cannot avail itself of any defense as to the running of the statute prior thereto.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated and referred to in the opinion of the court.

George C. Sargent, for Appellant.

F. William Reada, for Respondent.

HARRISON, P. J.—Action to recover from the defendant certain moneys received by it upon a sale by the sheriff of certain merchandise belonging to the defendant.

The facts connected with the transaction are given in the opinion in an action between the same parties reported at 137 Cal. 683, [70 Pac. 776], the difference between the two

actions being that the former was an action in claim and delivery for property purchased by the defendant at the sheriff's sale therein referred to, while this is for moneys received by the defendant from the sheriff upon the sale by him to other persons. The defendant sets up in its answer as special defenses to the action the statute of limitations and the pendency of another action. Upon this latter defense the court found that the action referred to was not for the same cause of action as that set forth in the complaint herein. It found that the plaintiff's cause of action accrued more than three years prior to the commencement of the present action, and is barred by subdivision 1 of section 339 of the Code of Civil Procedure. Judgment was thereupon rendered in favor of the defendant, from which and from an order denying a new trial the plaintiff has appealed. The only question presented upon this appeal is whether the plaintiff's cause of action is barred by the statute of limitations.

The defendant is a foreign corporation, and the present action against it was commenced October 3, 1900. The appellant contends that the statute of limitations is not available to the defendant as a defense herein for the reason that it did not at any time prior to May 2, 1901, file with the secretary of state any designation of a person upon whom process against it might be served, as is required under the act of April 1, 1872 (Stats. of 1872, p. 826), as amended by the act of March 17, 1899 (Stats. of 1899, p. 111).

The right of a state to prescribe the terms upon which a foreign corporation may carry on business within its territory is well established (*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, [5 Sup. Ct. 739].) "Having no absolute right of recognition in other states, but dependent for such recognition and enforcement of its rights upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment may best promote the public interest. The whole matter rests in their discretion." (*Paul v. Virginia*, 8 Wall. 168.) In *Hooper v. California*, 155 U. S. 648, [15 Sup. Ct. 207], the

same court said: "The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. . . . The power to exclude embraces the power to regulate; to enact and enforce all legislation in regard to things done within the territory of the state, which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always of course to the paramount authority of the constitution of the United States." (See, also, *Doyle v. Continental Ins. Co.*, 94 U. S. 535.)

By the aforesaid act of April 1, 1872, the state of California has declared that every foreign corporation shall "within sixty days from the time of commencing to do business in the state designate some person residing in the county in which the principal place of business is, upon whom process may be served, and file such designation in the office of the secretary of state," and in the second section of the act has prescribed, as a penalty for failing to make and file such designation, that it "shall be denied the benefit of the laws of this state limiting the time for the commencement of civil actions." The statute of limitations is purely a matter of legislative creation. In the absence of any statute upon the subject lapse of time would not constitute a defense to the right to enforce an obligation. The legislature has prescribed different periods of time within which different species of obligations may be enforced, and to some obligations it has declared that there shall be no limitation of time for their enforcement through its courts. (Code Civ. Proc., sec. 348.) It would have been competent for the legislature to declare that there should be no limitation of time against the enforcement of any obligation of a foreign corporation; and its declaration that upon its failure to file the above designation with the secretary of state it shall be denied the benefit of the statute of limitations was only an exercise of this admitted power.

We have not been cited to any authority in which a statute like the one under consideration contained prohibitory pro-

visions like the foregoing. *Lawrence v. Ballou*, 50 Cal. 258, relied upon by the defendant, was decided before the enactment of the above statute; and what was there decided was that a foreign corporation, having a managing agent exercising his authority as such in this state, is not "absent from the state" so as to prevent the running of the statute of limitations or deprive it of the benefit of the statute. This principle is all that was declared in *Turcott v. Yazoo etc. R. R. Co.*, 101 Tenn. 102, [70 Am. St. Rep. 661, 45 S. W. 1067], and *King v. National M. etc. Co.*, 4 Mont. 1. In *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, [58 Pac. 180, 61 Pac. 99], it was held that the statute was inapplicable to a foreign insurance corporation by reason of other statutes directly applicable to such corporations.

The foregoing provisions in the act of 1872 were not changed by the amendatory act of 1899—the amendments therein merely providing that the person to be designated by the corporation should reside in this state, and adding to the penalty for failure to make and file the declaration that the corporation "shall not maintain or defend any action or proceeding in any court of this state unless such corporation shall have complied with the provisions of section 1 of this act."

By this legislation the state of California does not purport to prohibit a foreign corporation from engaging in business before filing the designation therein named, or to affect the validity of any transaction it may enter into or any contract it may make. (*Fritts v. Palmer*, 132 U. S. 282, [9 Sup. Ct. 93].) Neither does the provision that it shall not "maintain" any action in the courts of the state deny it the right at any time to "commence" an action for the protection of its property or the enforcements of its rights (*Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369); and it is within its power at any time after the commencement of the action to comply with the statute and thereafter "maintain" such action. (*California S. and L. Soc. v. Harris*, 111 Cal. 133, [43 Pac. 525]; *Ward Land and Stock Co. v. Mapes*, 147 Cal. 747; *Carson-Rand Co. v. Stern*, 129 Mo. 381, [31 S. W. 772].) Whether the prohibition against defending an action in case of its non-compliance with the statute would authorize a judgment against the corporation as upon a default may be open

to dispute. It is not to be supposed that the legislature, by taking away the right to defend any action, intended that the corporation should be without the protection of the law, or that its property might be confiscated through the forms of law without any right to defend against the same. (See *Windsor v. McVeigh*, 93 U. S. 274.) The question, however, is not presented upon the present appeal. The corporation herein is not the plaintiff, and the action was not brought upon any contract or transaction made by it, but was brought to recover from it the damage sustained by reason of a tort committed by it within this state. Its right to defend the action was not questioned in the court below; and it did in fact interpose an answer to the complaint, traversing many of its allegations and setting up the foregoing special defenses, and at the trial appeared and contested the plaintiff's right of recovery. Under section 462 of the Code of Civil Procedure its special defense of the statute of limitations (sec. 339, subd. 1) was deemed controverted by the plaintiff, and by section 458 it then became incumbent upon the defendant to establish at the trial facts showing that the cause of action was so barred.

The averment in the complaint that the plaintiff's cause of action arose from the conversion by the defendant of certain merchandise made the above statute of limitations applicable; but by reason of the further averment therein, admitted by the answer, that the defendant was a foreign corporation, the above-mentioned act of 1899 took from the defendant the right to avail itself of this defense unless it should show that it had complied with that act by filing with the secretary of state the designation therein specified. The admission that for seven years prior to the commencement of the action it had maintained a branch office and place of business at a specified place in San Francisco, and had been there represented by its general managers, who were at all times in charge thereof, coupled with the facts shown at the trial and the admissions in the pleadings, sufficiently showed that it was "doing business" within the state.

To meet the above requirement the defendant introduced and read in evidence a document, certified by the secretary of state to be a correct copy of an original "certificate of the designation of agent" of the defendant on file in his office,

in which the defendant, after reciting that it is a foreign corporation, "having a branch office and doing business" in San Francisco, appoints and designates M. J. Hawley as a person upon whom process may be served as its agent and representative for that purpose. This instrument is not signed by any officer of the defendant, nor is it authenticated by its corporate seal; but it purports to have been made by M. J. Hawley as attorney in fact of the defendant. It is without date, and was filed in the office of the secretary of state May 2, 1901. It is executed by Hawley, is not itself in any way authenticated, nor was there any evidence of any authority from the defendant to Hawley to make such designation. It is contended that for these reasons it fails to show that the "corporation" ever designated Mr. Hawley as a person upon whom process against it could be served. As, however, we are of the opinion that for other reasons the judgment must be reversed, it is not necessary to determine the validity of these objections.

The defendant contends that by virtue of section 3 of the aforesaid act the effect of filing the designation with the secretary of state after the present action had been commenced was to create in its favor the same right to invoke the statute of limitations against the plaintiff's action herein as it would have had if such designation had been filed before the action was commenced or its obligation to the plaintiff was incurred. We are, however, unable to assent to this proposition. Section 3 of the act declares that every foreign corporation which shall comply with the provisions of section 1 shall be entitled to the benefit of the laws for the limitation of civil actions. This section is by its terms prospective in its operation, and under well-recognized rules of statutory construction would entitle the defendant to only such benefit as might accrue after filing the designation. The present action was commenced in 1900. At that time, and until the day before the trial thereof was had, by virtue of the above declaration of the legislature, the defendant was not entitled to the benefit of the statute of limitations; and the plaintiff had, therefore, a right of recovery irrespective of the lapse of time subsequent to the accrual of her right of action. A statute of limitations enacted by the legislature after the commencement of an action which would deprive plaintiff of his

right of recovery therein would be invalid, and the statute in question is not to be construed as having that effect or as giving to the defendant a defense which it did not have when the action was commenced. The legislature did not intend by this section that upon filing a designation after an action had been commenced the facts which in the previous section it had declared should not be available as a defense should constitute a defense. The cause of action existing in favor of the plaintiff when she filed her complaint was property of which she could not be deprived by the subsequent enactment of any statute, and a statute which should operate to give such effect to any subsequent act of the defendant would be equally invalid. The superior court, therefore, erred in holding that the plaintiff's cause of action was barred by the statute of limitations.

The judgment and order denying a new trial are reversed.

Cooper, J., and Hall, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on December 8, 1905.

[No. 48. First Appellate District.—October 10, 1905.]

CHARLES GALLETLY, Respondent, v. GODFREY M. BOCKIUS, Appellant.

ACTION TO QUIET TITLE—EASEMENT—RIGHT OF WAY—FINDING AGAINST EVIDENCE.—In an action to quiet title, where the evidence shows that plaintiff has only an easement of a right of way over the premises described, and that defendant is entitled to an easement therein of the same character, subject to plaintiff's enjoyment thereof, a finding that plaintiff owns the land and that defendant has no interest therein is against the evidence.

ID.—WAY MADE APPURTENANT TO DIFFERENT LANDS.—Where defendant was the original owner of the land, subject to plaintiff's right of way, and also owned lands bounded by it, he had the right to pass over the way as owner of the fee, subject only to plaintiff's enjoyment thereof; and upon selling such land he had the right

to reserve the way as an appurtenance to his contiguous tract bounded thereon, subject only to non-interference with plaintiff's enjoyment of the way.

ID.—POWER OF OWNER TO CREATE EASEMENTS.—While the owner of the dominant tenement cannot increase the burden of the servient tenement against the will of the owner thereof, the owner of the latter is by virtue of his *jus disponendi* not limited in the number or character of the easements to which he may make his land subject. He may subject it to the easement of a right of way in favor of or as appurtenant to different tracts of land, whether owned by the same person or by different persons.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Joseph H. Skirm, for Appellant.

Carl E. Lindsay, for Respondent.

HARRISON, P. J.—Action to quiet title. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The land described in the complaint is the southerly twenty feet of a tract of about forty acres bordering upon the county road from Watsonville to San Jose, and extending easterly therefrom about seventeen hundred feet, and which, for convenience of reference, is styled herein as tract "A." The plaintiff is the owner of a tract of land, herein called tract "B," contiguous thereto and lying easterly therefrom, and the defendant is the owner of a tract, called herein tract "C," lying southerly from the above tracts and contiguous to each of them. All of the land was at one time owned by John S. Barrett, who, in September, 1884, conveyed to Ascencio Mendia tracts "A" and "B," and in August, 1887, conveyed tract "C" to the defendant. September 30, 1886, Mendia conveyed tract "A" to Francisco Mora with the following reservation in the deed of conveyance: "The party of the first part reserves the right of way 20 feet wide along the boundary-line of the within mentioned tract and lands of J. S. Barrett; said right of way is to commence at the county road and along the line of lands of Barrett until it

reaches the lands of A. Mendia." December 1, 1891, Mendia executed to Mora another conveyance of tract "A," "to perfect and correct the description" in his former deed, and inserted therein the following: "Said Ascencio Mendia reserves the right of way 20 feet wide along the easterly boundary of the above-described tract and lands of G. M. Bockius; said right of way is to commence at the county road and continue along the line of lands of said Bockius until it reaches the land of A. Mendia." December 9, 1891, Mora executed to the defendant a conveyance of tract "A," "save and except from the above-described tract a right of way 20 feet wide along the eastern boundary thereof reserved by A. Mendia." August 29, 1892, Mendia executed to the plaintiff a conveyance of a tract of land whose description included tracts "A" and "B," excepting therefrom, however, the premises conveyed to Mora by his deed of December 1, 1891. With the title to the land in this condition the defendant herein, in June, 1893, commenced an action in the superior court for Santa Cruz County against the plaintiff herein to quiet his title to tract "A," in which judgment was entered March 28, 1895, declaring him to be the owner in fee simple of said tract "A," and that the plaintiff herein is the owner of a right of way in the southerly twenty feet of said tract as appurtenant to tract "B," and that he has no other right or interest in tract "A" than said right of way. Subsequent to the entry of this judgment,—viz., April 11, 1895,—the defendant herein conveyed to one Martinelli tract "A," describing the same as the same land conveyed to him by Mora by the aforesaid deed of December 9, 1891. and containing the following reservation: "The said Godfrey M. Bockius hereby reserves for himself, his heirs and assigns, the use of the right of way mentioned in aforesaid deed as an appurtenance to his adjoining premises." The present action was commenced April 11, 1900. At the trial thereof the court found that at the commencement of the action the plaintiff was the owner of and entitled to the possession of the land described in his complaint, and that the defendant had no estate, title, or interest therein, or in any easement or right of way in or over same, and rendered judgment accordingly.

Upon the aforesaid evidence it clearly appeared that at the commencement of the action Martinelli was the owner in fee

of the land described in the complaint, and that the present plaintiff had only an easement therein of a right of way. The finding therefore that he was the owner, and entitled to the possession of the land described in his complaint is not sustained by the evidence. This is not seriously controverted by the counsel for the respondent, but he contends that the reservation by the defendant in his conveyance to Martinelli of an easement of a right of way as appurtenant to his adjoining land in land which was already subject to a similar easement held by the plaintiff for another tract of land was unauthorized in law, and therefore void, and that for this reason the error was harmless. No authority has been cited in support of this proposition, and at the argument herein counsel for respondent admitted that he had not been able to find any such authority.

It must be borne in mind that by the reservation in his conveyance to Martinelli the defendant was not in the position of the holder of a dominant tenement seeking to extend the burden of an easement created for certain lands to other lands for which it had not been created, but was rather in the position of the owner of land already subject to a servitude, and providing for placing an additional servitude thereon. At the time of his conveyance to Martinelli he was the owner in fee of the lands so conveyed, subject to the easement in the southerly twenty feet thereof held by the plaintiff, and as such owner he had the unquestioned right to make such use and disposition of the entire tract as he might choose, provided such use was not inconsistent with the use of the same by the plaintiff for his right of way. (*Atkins v. Borden*, 2 Met. 457, [37 Am. Dec. 100]; Washburn on Easements, *195.) He had the right to use this strip for all purposes of travel and at all times, so long as he did not by such use interfere with or impair the plaintiff's enjoyment of his easement. (*Wells v. Tollman*, 156 N. Y. 636, [51 N. E. 271].) If he had conveyed to Martinelli all of tract "A" lying to the north of the twenty-foot strip,—retaining for himself the ownership of the remainder,—his right, as aforesaid, to use the strip as a passageway to the county road could not be questioned. As owner of the tract he had the right to dispose of it as a whole or in subdivisions, and could make such disposition absolute or qualified or limited, or with such

reservation or exception as might be agreed upon between him and his vendee. We are not aware of any principle of law which precludes the owner of a tract of land from subjecting it, or suffering it to be subjected, to the easement of a right of way in favor of, or as appurtenant to, different tracts of land, whether the same be owned by the same person, or by different persons. While the owner of the dominant tenement cannot increase the burden of the servient tenement against the will of the owner of the latter, yet the owner of the servient tenement, by virtue of his *jus disponendi*, is not limited in the number or character of the easements to which he may make his land subject.

The reservation by the defendant in his conveyance to Martinelli was therefore within his right, and Martinelli, by accepting the deed containing such reservation assented to the servitude thereby imposed upon the land conveyed to him. The plaintiff did not acquire any additional interest in the land, or any further right to its use, by reason of this transaction between the defendant and Martinelli, but the use and enjoyment of the easement by the defendant must be such as will not interfere with the enjoyment by the plaintiff of the easement appurtenant to his land. (*Herman v. Roberts*, 119 N. Y. 37, [16 Am. St. Rep. 800, 23 N. E. 442].) The rights of the plaintiff under that easement, as between him and the defendant, are defined in the aforesaid judgment between them, and were not varied by the transaction between the defendant and Martinelli. The superior court therefore erred in holding that the defendant has no right or interest in the lands described in the complaint.

The judgment and order denying a new trial are reversed.

Cooper, J., and Hall, J., concurred.

[No. 60. Third Appellate District.—October 11, 1905.]

A. F. COCHRAN, Respondent, v. W. H. BONES, Appellant.

MALICIOUS PROSECUTION—ARREST FOR PETIT LARCENY—FAULTY DESCRIPTION OF CRIME—MISTAKE IN NAME.—Where the defendant maliciously prosecuted and caused the arrest of the plaintiff for the alleged crime of petit larceny, without probable cause, and well knowing that no such crime had been committed, he cannot escape liability for damages for the malicious prosecution because of a faulty description in the complaint of the facts constituting the crime charged, nor because of a mistake in the name of the plaintiff whom he intended to prosecute for such crime.

ID.—ADVICE OF MAGISTRATE—CONCEALMENT OF FACTS.—The defendant cannot claim protection under the advice of the magistrate that the crime charged had been committed, where he concealed facts from the magistrate which, if disclosed, would have prevented the issuance of the warrant.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge.

The facts are stated in the opinion of the court.

J. M. Thompson, and J. A. Barham, for Appellant.

J. R. Leppo, for Respondent.

BUCKLES, J.—This is an action for malicious prosecution. Plaintiff had judgment. Defendant moved for a new trial which was denied, and this appeal is from the judgment and from the order denying the motion for a new trial.

Defendant went before the justice of the peace of Anady Township in Sonoma County and swore to a complaint charging the plaintiff with petit larceny in stealing a hog, upon which the justice issued his warrant and placed the same in defendant's hands. Defendant Bones and plaintiff Cochran lived about a mile and a half from each other, and had so lived for several years, but had only a speaking acquaintance, and the defendant did not know plaintiff's name. In April, 1902, one of defendant's hogs strayed upon the farm of plaintiff, who did not know to whom the hog belonged. The said hog was seen on plaintiff's place as often as once a week until

October of that year, when plaintiff shut his hogs up for the purpose of feeding them, and drove this stray hog away repeatedly, but it kept coming back and he finally found it in the pen with his hogs and did not remember whether he put it there or not, but had no intention of appropriating it to his own use, but let it remain with his hogs until some one should come for it. Defendant came for the hog on a day when plaintiff was absent, when plaintiff's wife requested defendant not to take it away until her husband should return, and defendant complied with her request. On the following day plaintiff went to defendant's home to see him about the hog, when the following conversation ensued between them:—

Defendant.—"You have one of my hogs in your pen?"

Plaintiff.—"Is that so?"

Defendant.—"Yes, sir; I was over there to get it yesterday."

Plaintiff.—"Wouldn't it have been better to have said something to me when you saw me on the road about that being your hog, if it is your hog, and it would look better to come to me like a man and say something to me before trying to take it away?"

Defendant.—"That is my hog and I am going to have it."

Plaintiff.—"I don't think that is a very manly way to get it."

Defendant.—"You have no right to have him shut up there."

Plaintiff.—"I think I have if the hog was doing me damage."

Defendant.—"You have not posted him and have no right to shut him up without posting him."

Plaintiff.—"Didn't you know the hog was there?"

Defendant.—"No, I didn't."

Plaintiff.—"Why didn't you come and get him?"

Defendant.—"I didn't have to." (Then defendant said something about plaintiff giving him eight dollars and keeping the hog, to which plaintiff said): "No, if you want to pay the damages against the hog you can have him, I don't want him."

Defendant then declared he would have the hog and would have plaintiff arrested for stealing. Defendant did not come after the hog again.

This conversation above referred to occurred prior to November 3, 1902, when defendant went to the justice's office and stated to the justice that one Schochran, of Green Valley, on the third day of November, 1902, at Green Valley, in the county of Sonoma, state of California, did "willfully and unlawfully take and keep one hog belonging to said W. H. Bones and refusing to give the said hog to said W. H. Bones when requested, the said hog having been kept in the possession of said Schochran since the middle of June, 1902, the same never having been advertised according to law."

The justice informed defendant that this was petit larceny, and made out the complaint in the words above, adding "And charges the said defendant with the crime of petit larceny." This was all defendant said to the justice, and did not tell him how the hog came to be in the possession of the plaintiff. The plaintiff was tried and acquitted on said charge, the said W. H. Bones not appearing at the trial. Whatever may be said as to the name of "Schochran" appearing in the complaint and warrant, all the facts point unmistakably to the one fact, that defendant Bones meant to charge the plaintiff A. F. Cochran with petit larceny in stealing a hog, was quite anxious to have A. F. Cochran arrested on said warrant, and took the warrant himself to the officer, and described to him A. F. Cochran and urged his arrest under the said warrant, which warrant, legal in every respect, failed only to designate the person intended by the correct name. The evidence shows that there was no person in that neighborhood by the name of "Schochran," no one being at the place designated as the residence of the man who had defendant's hog by the name of "Schochran," but that on the contrary the plaintiff A. F. Cochran did live there. The defendant intending, as is clearly shown, to charge A. F. Cochran with petit larceny and to cause the arrest of A. F. Cochran, cannot now shield himself by his mistake in failing to give the correct name. The case is malicious prosecution. The facts alleged in the complaint before the justice for all intents and purposes, so far as malicious prosecution requires, do charge petit larceny. "Did willfully and unlawfully take and keep one hog belonging to the said W. H. Bones," may not charge petit larceny as defined in the code. But the concluding part of the criminal complaint clearly makes the accusation of a

crime when it says "and charges said defendant with the crime of petit larceny." But it is immaterial whether the complaint before the justice charged the crime with all the particularity required to make an absolutely faultless criminal charge, for the defendant was a malicious prosecutor in a criminal proceeding. He went before the justice of the peace, who had the right and power to issue a warrant of arrest for a person charged with a crime. He charged the plaintiff with the crime of petit larceny and caused plaintiff's arrest without probable cause. And he cannot afterwards be heard to say, "as the complaint does not sufficiently describe the crime of petit larceny, I am not liable for the damage done." In *Harrington v. Tibbett*, 143 Cal. 80, [76 Pac. 816], it is said: "When one maliciously, and without probable cause, subjects another to a criminal prosecution, the injury is the same whether it is instituted on a false statement of facts or a false conclusion of law." And we add, or on a faulty description of the offense. "If the reason for the action lay solely in the danger of punishment in which the man [prosecuted] is put, it might be otherwise. But the action lies because of the disgraceful imputation put upon him, the injury caused by his arrest, and the trouble and expense he is put to in defending himself." And this rule, founded as it is on good sense and reason, we are sure is the proper rule in such cases.

That the prosecution was without probable cause, fully appears; and that it was malicious there can be no doubt. As has been seen, the parties had talked about the detention of the hog in which plaintiff informed the defendant that the hog had strayed onto his premises, did damage, and was detained until damage done by said hog should be paid for. Defendant knew he could get his hog by paying the damage done, and instead of doing so had declared he would have the hog and would have plaintiff arrested for stealing, and on going to the justice and stating the case to the justice he concealed the facts which, if they had been disclosed, would have shown the justice there was no stealing and that there had been no crime committed. The testimony in the case before the lower court is here in the statement, and it nowhere appears that defendant was ignorant of the facts. He had declared that he would have the plaintiff arrested for steal-

ing, and he must have gone to the justice with that determination in his mind, and there is no dispute but what he knew the facts just as enumerated above; and, if so, he doubtless knew that if he made a fair and full statement to the justice, that officer would refuse to issue a warrant. What other facts would be necessary to show malice on the part of the defendant? It is true defendant did not appear when the trial was to take place before the justice. But why should he when he knew that no crime had been committed? He probably had done the plaintiff all the damage and put him to all the trouble and expense defendant's malice prompted.

At the trial in the lower court the defendant offered no evidence whatever, relying wholly upon the three points: that plaintiff was arrested upon a warrant in which the name of "Schochran," and not "Cochran," was used; that he had fully stated the facts to the justice and that the justice advised him the crime was petit larceny; and that the criminal complaint did not charge a crime.

The findings are sustained by ample and uncontradicted evidence, and the findings support the judgment.

The judgment is affirmed.

McLaughlin, J., and Chipman, P. J., concurred.

A petition to have the cause heard by the supreme court after judgment in the district court of appeal was denied by the supreme court on December 8, 1905.

[No. 73. First Appellate District.—October 13, 1905.]

GEORGE W. HOOPER, Respondent, v. JOHN J. McDADE
et al., Appellants.

**ACTION UPON SHERIFF'S BOND—FALSE RETURN OF SALE—GRAVAMEN—
NEGLECT OF DUTY—UNOFFICIAL STATEMENTS NOT INCLUDED IN RE-
TURN.**—In an action upon a sheriff's bond for damages incurred
by a false return of an order of sale, the gravamen of the action
is the neglect of the sheriff to perform an official duty. Any state-
ment or omission in his return not required by his official duty
to be stated is no part of his return, and cannot constitute a neglect
or breach of duty.

ID.—SALE UNDER FORECLOSURE—SATISFACTION OF JUDGMENT—EXTRA-OFFICIAL FALSE STATEMENT.—Upon a sale under foreclosure it is no part of the duty of the sheriff to state in his report whether the proceeds are insufficient to make the payments directed or the amount of any deficiency; and an extra-official false statement that the order of sale and decree of foreclosure were fully satisfied, made in the report and indorsed upon the order, does not render him liable.

ID.—JUDGMENT CREDITOR NOT CONCLUDED—AMOUNT OF DEFICIENCY.—The judgment creditor is not concluded by such report from having the deficiency computed and docketed against his judgment debtor after the sheriff's return of the writ.

ID.—DUTY OF CLERK—REQUEST OF PARTY INTERESTED.—It is not the duty of the clerk to ascertain and docket the deficiency without any request so to do from the party interested therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Kerrigan, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Appellants.

W. F. Sawyer, for Respondent.

HARRISON, P. J.—The plaintiff seeks by this action to recover damages alleged to have been sustained by reason of the failure on the part of the defendant McDade to perform certain acts as sheriff of the city and county of San Francisco. The other defendants are sureties upon the official bond of McDade.

In an action in the superior court for the city and county of San Francisco for the foreclosure of a mortgage, in which the Western Loan Association was plaintiff and Flavien Vanderveken et al. (including George W. Hooper, the plaintiff herein) were defendants, judgment was rendered that the mortgaged premises be sold by the sheriff, and that out of the proceeds of the sale he pay to the plaintiff the amount found due to it (specifying said amount), and that out of the surplus after making such payment, if any there should be, he should pay to the defendant Hooper the sum of \$659.88, or so much thereof as the balance of said surplus would pay; and that if the said balance should be insufficient to pay said

amount to Hooper the sheriff should specify the amount of such deficiency in his return of said sale, and that the clerk docket a judgment for such deficiency against the other defendants in the action, and that Hooper have execution therefor. An order of sale directed to the sheriff of said city and county of San Francisco, was delivered to the defendant McDade as such sheriff, attached to a copy of said judgment, in which he was directed to sell the said lands and apply the proceeds of the said sale "as in said judgment directed," and to make and file his report of said sale within sixty days after his receipt thereof, and to do all things according to the terms and requirements of said judgment and the provisions of the statute in such case made and provided. After executing this order of sale the sheriff returned the same to the clerk of the court with a report of his doings indorsed thereon, in which he stated that he had sold the lands for an amount of money sufficient, after deducting his fees and the expenses of sale, to pay to the plaintiff the amount directed to be paid to it, and that he had applied the same "in full satisfaction of the annexed order of sale and decree of foreclosure as will more fully appear by the receipt of the plaintiff's attorney indorsed thereon." Indorsed upon the order of sale was the receipt of the plaintiff's attorney of this amount of money "in full satisfaction of the within"; and also a certificate of the sheriff in the following words, viz.: "I hereby certify that I have this 17th day of September, 1894, returned the within order of sale and decree, etc., fully satisfied at the city and county of San Francisco."

The plaintiff claims that the sheriff, in the report of his sale of the land, falsely and in violation of his duty as sheriff certified that he had returned the order of sale fully satisfied; and that his failure to certify in said return that the proceeds of the sale were insufficient to satisfy the judgment in favor of Hooper, and his failure to specify the amount of such deficiency, were in violation of his duty as such sheriff, and that by reason thereof no judgment for any deficiency was docketed against the other defendants; that in January, 1896, one of said defendants became the owner of certain real property in San Francisco, and that a deed to her therefor was recorded on February 14, 1896, and that a few days thereafter the property was sold and conveyed by said defendant;

that had the sheriff made a truthful and proper return upon such order of sale, and specified the amount of the deficiency of the proceeds for the payment of the judgment in favor of Hooper, the latter would have had the judgment for such deficiency docketed against said defendants, and would have been able to satisfy the same out of the property subsequently conveyed to one of them as aforesaid; that the said defendants are insolvent; that by reason of the aforesaid violation of his duties as sheriff in making a false return of said order of sale, and in failing to specify the amount of the deficiency judgment, the plaintiff herein has sustained damages to the extent of said judgment. Upon the trial of the case the court held in accordance with the aforesaid claim of the plaintiff, and rendered judgment in his favor for the sum of three hundred and fifty dollars—the value of the land conveyed to and sold by the other defendant in February, 1896. From this judgment the defendant has appealed.

Although this action is styled by counsel an action against the sheriff for a false return, the gravamen of the plaintiff's cause of action is to recover damages sustained by him by reason of the failure or neglect of the sheriff to perform an official duty. (See *Raker v. Bucher*, 100 Cal. 214, [34 Pac. 654, 849].) The return of a sheriff to a writ is his official statement of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law, and must show a compliance with such directions and requirements, or a sufficient reason for any non-compliance either in whole or in part. (Freeman on Executions, sec. 355.) His statement or silence with reference to any fact which his official duties do not require him to make, or his opinion as to the legal effect of his acts, whether correct or erroneous, does not form any part of his return, and will not affect the rights of any party to the action; and if incorrect or erroneous will not constitute a false return. The false return for which a sheriff is liable is one that is false in fact as distinguished from a correct return of the acts actually done by him, though in violation of his duty. (See *Lemit v. Mooring*, 8 Ired. (N. C.) 312.) The neglect with which the sheriff is charged in this action is his failure to specify in his return of sale the amount of the deficiency of the proceeds thereof to satisfy the judgment of the plaintiff herein. If

the act which he has thus neglected or omitted to perform was a part of his official duty, and the plaintiff has sustained damage by reason of such omission, he and his sureties are liable therefor. If, on the other hand, he was under no obligation to perform the act the plaintiff has no right of recovery. Whether he is liable by reason of his certificate indorsed upon the order of sale that he returned the same fully satisfied, or the statement in his report that by reason of his acts the order of sale and decree of foreclosure were fully satisfied, depends upon whether he was authorized to make such certificate or determination of that question.

The duties of a sheriff are defined in section 4176 of the Political Code to be " . . .

"8. Serve all process and notices in the manner provided by law;

"9. Certify under his hand upon process or notices the manner and time of service, or, if he fails to make service, the reasons of his failure, and return the same without delay."

By section 4175 "process" includes all writs, summons, and orders of courts of justice. Section 684 of the Code of Civil Procedure provides: "When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith."

The directions statutory to a sheriff for the execution of an order for the sale of property in satisfaction of a lien thereon and his corresponding authority and duty are not the same as those prescribed for the execution of a money judgment. In the latter case the writ of execution "must require the sheriff to *satisfy* the judgment" out of the property of the judgment debtor, and under this direction he has authority to take any property of the debtor within his bailiwick; and by virtue of this fact and his authority to "satisfy" the judgment it is held that upon his return that he had "satisfied" it he is estopped from disputing the receipt by him of the money called for in the judgment. Under an order of sale like the one in the present case the authority of the sheriff extends only to making a sale of the property therein described, and the payment of the proceeds of said sale "as in

said judgment directed," and reporting the manner and time of making such sale and payment. Whether by such payment the judgment in favor of those to whom the payment was to be made would be satisfied is to be determined by rules of law applicable thereto, and not by the opinion or statement of the sheriff. It must be held, therefore, that, as he was not clothed with any authority to determine this question, his statement in his report of sale in reference to the satisfaction of the judgment, as well as his similar indorsement on the order of sale, was extra-official, and did not constitute a violation or breach of his official duty, or have any effect on the rights of the parties to the action. It may be added that the statement in his report that he had applied the proceeds of the sale in full satisfaction of the decree of foreclosure "as will more fully appear by the receipt of the plaintiff's attorney indorsed thereon" shows by this reference that he did not intend to include the judgment in favor of Hooper, since the plaintiff's attorney had no authority to acknowledge satisfaction of the judgment in his favor.

There is no statutory provision requiring the sheriff to state in his report whether the proceeds of the sale were insufficient to make the payments therein directed, and if so the amount of such deficiency; and in the absence of such provision his failure to make such statement cannot be regarded as a breach of his official duty. Such fact cannot be ascertained until after he has executed the writ by a sale of the property and made the application of the proceeds thereof, and forms no part of his report of the facts touching the time and manner of its execution. The ascertainment whether there is a deficiency, as well as its amount, is a mere matter of clerical computation to be made after the sheriff has returned the writ, and in the absence of statutory authority cannot be imposed upon him as a part of his ministerial duties in executing the writ.

The failure of the sheriff to state in his report that the proceeds of the sale were insufficient to pay to Hooper any portion of the judgment in his favor, and to specify the amount of such deficiency, did not preclude Hooper from having such deficiency docketed against his judgment debtor. The right of a judgment creditor to have a judgment docketed for a deficiency is not concluded by the sheriff's failure to

state that there is a deficiency if it appears from the facts set forth in his report that such deficiency exists. Nor is the party entitled to a judgment for a deficiency bound by the amount which the sheriff may specify in his return. Even if it be the fact, as stated by the plaintiff in his complaint, that if McDade had specified the deficiency in his return he would have had a judgment therefor docketed against his judgment debtor, it does not follow that it was a part of the sheriff's official duty to specify such deficiency. The plaintiff does not state that such docketing would have been made without his application therefor; and as he knew that he had received none of the proceeds of the sale he was thus informed that there was a deficiency for which he was entitled to have a judgment docketed. There is no provision of law which makes it the duty of the clerk, when the sheriff files the report of his sale showing a deficiency of proceeds, to docket a judgment for such deficiency without any request so to do from the party interested. Section 726 of the Code of Civil Procedure, as it read at the time of these transactions, declared "*If it appear* from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed . . . for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued." The same provision was contained in section 246 of the old Practice Act; and in *Leviston v. Swan*, 33 Cal. 480, the court said: "Of what the judgment in a foreclosure case shall consist is declared in the two hundred and forty-sixth section of the Practice Act. All that it needs or should contain is a statement of the amount due the plaintiff,—the designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sale, the costs of the action and the debt. Nothing further is required. All else is ministerial and is expressly regulated by the statute, which is not made clearer or more binding by being copied into the judgment. . . . If it appears from his report that the amount due the plaintiff has not been fully paid by the sale the clerk then

dockets the judgment for the balance due against those defendants named in the judgment as being personally liable for the payment of the debt without any order from the court." The judgment creditor may at any time present to the clerk or to the court the sheriff's report, showing that it appears therefrom that the judgment has not been fully satisfied, and procure from that officer an entry docketing a judgment for the deficiency. That a deficiency in the present case did exist in favor of Hooper appears upon the face of the sheriff's return when read in connection with the order of sale and the judgment to which it is attached, and it was in the power of the plaintiff at any time after the return was filed to have a judgment therefor docketed. Instead of making an application therefor it appears by his complaint that he did not ascertain the character of the return until nearly eighteen months after it had been filed with the clerk.

The judgment is reversed.

Cooper, J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 13, 1905.

[No. 183. First Appellate District.—October 14, 1905.]

In the Matter of the Estate of ANGELIA B. SCOTT, Deceased. C. M. GERRISH, and FRANK GARCIA, Executors, Appellants, v. MORTIMER S. CHAMBERLAIN, RACHAEL JOHONNOTT, C. S. TILTON, Executors, and EUGENE WORMELL et al., Respondents.

ESTATES OF DECEASED PERSONS—SETTLEMENT OF ACCOUNT OF EXECUTORS—EXPENSE IN OBTAINING PROBATE—CONTEST OF WILL—REVIEW UPON APPEAL.—Upon appeal from a decree settling the accounts of executors, the question whether the executors properly incurred items of disbursement set forth in their accounts in obtaining probate of the will in case of a contest thereof was to be determined by the court upon the evidence before it; and where the evidence is not set forth in the record upon appeal error is not to be presumed, and it cannot be said that the court acted in refusing to allow them as a charge against the estate.

- ID.—CONSTRUCTION OF CODE—ALLOWANCE OF COSTS—DISCRETION.**—Section 1720 of the Code of Civil Procedure relates only to costs incurred in the appellate court, and does not import that this court has discretion to allow costs that the lower court had discretion to disallow.
- ID.—REFUSAL OF DEVISEES AND LEGATEES TO CONTRIBUTE.**—The fact that some of the devisees and legatees refused to contribute to the expenses of the contest of the will furnishes no legal reason for this court's interfering with the order in the absence of any showing that those who refused to contribute would not have received more if the will had been denied probate.
- ID.—IMPROPER USE OF FUNDS—CHARGE OF INTEREST.**—The court properly charged interest at the legal rate on funds drawn from bank by the executors and improperly disbursed in payment of items in the account which were disallowed by the court and which are not properly before this court for review.
- ID.—SALES OF PERSONAL PROPERTY WITHOUT ORDER OF COURT—SURCHARGE OF VALUE AT TIME OF SALE.**—Where the executors sold cooerage at private sale at a price in excess of the amount appraised without any order of court or notice of sale or order confirming the sale, their accounts showing sales at the appraised value were properly surcharged with what was shown to be the excess in actual value at the time of the sales, without regard to the amount of excess received.
- ID.—ATTORNEYS' FEES—DEDUCTION AND INCREASE IN ALLOWANCE—EMPLOYMENT OF SEVERAL ATTORNEYS BY SEVERAL EXECUTORS.**—Where the court allowed an aggregate sum to be drawn from court by three executors to pay attorneys' fees, without direction as to apportionment between attorneys employed by two of them and an attorney employed by the third, the court upon final settlement of the accounts had power to deduct an allowance from the amount paid to the former and to increase the allowance made to the executors for the latter. This only affects the settlement of the executors' accounts; and cannot conclude the attorneys, for the value of whose services the executor or administrator employing them is personally liable.
- ID.—CONSTRUCTION OF CODE—POWERS OF MAJORITY.**—Section 1255 of the Code of Civil Procedure, providing that "where there are more than two executors or administrators the act of a majority is valid," does not import that the majority can deprive the remaining executor or administrator of the assistance and advice of counsel.

APPEAL from a decree of the Superior Court of the City and County of San Francisco settling the final accounts of executors. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

A. E. Bolton, and Philip G. Galpin, for Appellants.

Houghton & Houghton, for Mortimer S. Chamberlain and Rachael Johonnott, Respondents.

John B. Gartland, for C. S. Tilton, Executor, Respondent.

Louis Seidenberg, and R. P. Clement, for Eugene Wormell et al., Respondents.

COOPER, J.—This is an appeal by the executors from portions of the decree settling their accounts and disallowing certain items therein.

1. The first item disallowed by the court is "Expenses of contest in the probate of will of Angelia R. Scott, deceased, \$1,681.63."

Under the heading "Disbursements by Executors" are set forth in the accounts several items, aggregating \$1,686.13, claimed to have been incurred for expenses in establishing the validity of the will. Upon the hearing at the settlement of the accounts the court made the following finding of fact in reference to these items:—

"I find that the items on the credit side of the second annual account, amounting to the sum of \$1,686.13, including \$1,560 drawn from the bank to pay the expenses of deferring the will upon the contest for its admission to probate, are an improper credit, and ought not to be allowed excepting the item, 'January 15, 1899, by publication notice of the time and place for proof of the will, \$4.50,' which is allowed. Total amount disallowed on this item, \$1,681.63.

"And as the executors did, on the 11th day of June, 1901, without any order of court, draw from the funds of the estate deposited in the Donohoe-Kelly Banking Company's bank the sum of \$1,560, which sum was used by said executors in part payment of the above disallowed items of costs, said executors must be charged with interest on said amount of \$1,560 at the rate of seven per cent per annum from the 11th day of June, 1901, to the time of the payment of said money back into the estate, or until the same is deposited in the Donohoe-Kelly Banking Company's bank to the credit of the executors of said estate."

In the decree settling the said accounts the court disallowed

the above items, and surcharged the accounts with their amount.

The facts connected with the above item of fifteen hundred and sixty dollars are as follows, viz.: In order to raise money to meet the expenses to be incurred in defending the will against the contest for its probate, certain devisees advanced that amount of money for such expenses, and, as shown by the finding, on the eleventh day of June, 1901, the executors withdrew this amount from the funds of the estate deposited in the bank, apparently for the purpose of reimbursing the said devisees, and credited themselves in their account with the payments of the items of expense. The mention of the transaction in the finding is relevant only for the purpose of fixing the amount which the executors are required to return to the estate, and the date from which interest thereon is to be paid by them.

The executors have not specified any particulars in which the evidence before the court was insufficient to justify the above finding of fact, and it does not appear from the bill of exceptions that they took or had entered of record any exception to the order of the court in disallowing said items. Neither is there any evidence in the bill of exceptions which in any way illustrates the character of those expenses; and the items which form by far the greater part of the amount disallowed by the court are not by their terms as set forth in the account *prima facie* of such a character as would require the court to allow them as a charge against the estate.

Whether the executors properly incurred the items of expense set forth in their account in obtaining probate of the will was to be determined by the court upon the evidence before it in reference thereto. Error is not to be presumed, and in the absence of the evidence before it we cannot say that the superior court erred in refusing to allow them as a charge against the estate.

Appellants contend that section 1720 of the Code of Civil Procedure authorizes this court to allow and order paid the costs incurred during the contest. The section, as to this court, refers to costs incurred here or by reason of the appeal. It does not mean that this court has discretion to allow costs that the lower court had discretion to disallow. The fact that some of the devisees and legatees refused to contribute to the

expenses of the contest furnishes no legal reason for interfering with the order. It may be that the devisees who did contribute are the ones to whom most of the property is devised or bequeathed, and that those who refused to contribute would have received more if the will had been denied probate.

2. Appellants claim that the court erred in surcharging the executors with interest on sums amounting to two hundred and thirty dollars drawn out of the bank for the purpose of paying a bookkeeper for the estate. The court found that two hundred and thirty dollars had been drawn, without any order of court, from the funds of the estate in the Donohoe-Kelly Banking Company's Bank, and paid to McGowan as bookkeeper, and that "such amount was improperly paid, is hereby disallowed, and the executors must be charged with interest on the several sums drawn out of said bank . . . at seven per cent per annum for the respective times said checks were drawn to the time of the payment of said money back into the estate."

The finding of the court that the money was improperly paid is not questioned. The amount of interest charged is not computed nor stated; but conceding that the money, upon which the interest was charged, was improperly used by the executors, they are responsible for interest on it at the legal rate. The question as to whether or not the executors had the right to employ and pay the bookkeeper out of the funds of the estate is not before us.

3. The next contention is that the court erred in surcharging the accounts with \$836.88, the excess in value of 235,043 gallons of redwood cooperage over the amount returned in the account. The finding of the court as to this item is as follows: "The number of gallons of redwood cooperage sold and accounted for in this account is 235,043. The redwood cooperage was appraised in the inventory filed by the executors on the 9th of May, 1900, at $\frac{1}{2}$ c per gallon. The executors sold the greater part of said cooperage at $\frac{1}{2}$ c per gallon, selling some in excess of that amount, and some at $\frac{3}{8}$ c per gallon, in various lots from time to time, without having obtained any order of the court for that purpose, and said sales were made at private sale without any notice of sale being given, and no return of sales of redwood cooperage has ever been made to this court; and no order has heretofore

been made confirming said sales. The value of such cooperage at the time of sales being $\frac{7}{8}$ c per gallon, the executors are to be charged with this cooperage at that price and credited with the total amount of sales accounted for in said accounts.

"The executors are therefore to be charged with \$2,056.62 less \$1,219.75, which is the amount of said cooperage accounted for as sold, leaving a balance of \$836.88, with which the executors should be charged."

After a careful examination we are of opinion that the evidence supports this finding. No order of sale was obtained before selling the cooperage. The sales were made without legal notice, and no returns of sales made except in the accounts. The accounts do not give the names of all the various purchasers, and it was only by the diligence of the respondent's counsel that most of them were found. It was shown, contrary to the accounts, that many sales were made in excess of one half cent per gallon as stated in the accounts.

The witness Carpy testified that he had been engaged for twenty-five years in the wine business; that he had seen the cooperage, knew the value of that kind of cooperage, and had had a great deal of experience in buying and selling that kind of property; that in his opinion the cooperage would sell for three quarters of a cent per gallon. The court found, and the evidence shows, that several sales were made at seven eighths of a cent per gallon and one at two thirds of a cent per gallon. The executors admitted that they had made sales in excess of one half of a cent per gallon in the face of their verified accounts showing all sales at one half of a cent.

By selling the cooperage at private sale without an order of court, the executors became responsible to the estate for its value. (*In re Radovich*, 74 Cal. 538, [5 Am. St. Rep. 466, 16 Pac. 321].)

If the sales had been made for the full value of the property and the accounts had shown such sales correctly, giving the date of sale and the name of the purchaser in each separate case, the question would be different.

We do not attach much importance to appellant's contention that it is not shown that more money was received for the total cooperage sold than stated in the accounts. It might have been very difficult for the parties contesting the accounts to make such proof; and even conceding that the total amount

of money received for cooperation is credited to the estate in the accounts, the executors having sold without an order of court are responsible for the value of the property sold.

4. Finally it is claimed that the court erred in making an order deducting from the item of forty-seven hundred and fifty dollars paid as attorneys' fees to Galpin & Bolton the sum of seven hundred and fifty dollars.

The executors had drawn from the bank, by order of court, long before the account was settled the sum of five thousand dollars to be applied as attorneys' fees. The court did not direct, and in fact had no right to direct, the manner in which the five thousand dollars should be apportioned between the attorneys. The two executors, however, who received the money, paid forty-seven hundred and fifty dollars of it to their own attorneys, Messrs. Galpin & Bolton, and two hundred and fifty dollars to the attorney of the other executor, before any order had been made allowing attorneys' fees to either of the executors. The executors, although represented by different attorneys, filed their accounts jointly, in which they ask that the court allow them seventy-five hundred dollars as attorneys' fees for Messrs. Galpin & Bolton, who represented two executors, Garcia and Gerrish, and two thousand dollars as attorneys' fees for John B. Gartland, who represented and advised Tilton, the other executor. The court, in effect, found that the two executors who employed Messrs. Galpin & Bolton were entitled to be allowed four thousand dollars as the reasonable attorneys' fees incurred by them, and that the executor who employed Mr. Gartland was entitled to one thousand dollars as the amount of reasonable attorneys' fees incurred by him. The total amount allowed was five thousand dollars; and it makes no difference to the executors as representatives of the estate as to whom it is paid. The rule is well settled that attorneys' fees are not a claim by the attorney against the estate. The administrator or executor must be allowed reasonable attorneys' fees paid or incurred in the necessary management of the estate, but such attorneys' fees are allowed to the administrator or executor, and not to the attorney. (*McKee v. Soher*, 138 Cal. 370, [71 Pac. 438, 649], and cases cited.)

The executor or administrator is personally liable to the attorney employed by him for the reasonable value of the

services of such attorney, regardless of the amount allowed by the probate court, the probate court not having power to adjudicate between the attorney and the executor or administrator as to the amount of the fee. (*Briggs v. Breen*, 123 Cal. 660, [56 Pac. 683, 686].) Therefore the order made in this case does not conclude the attorneys as to the amount of their respective fees. The executors, in their official capacity, have no interest in settling the controversy between them. The effect of the appeal as to the executors represented by Galpin & Bolton is that the court did not allow a sufficient sum to cover the reasonable attorneys' fees incurred by them. If they are liable in excess of the amount allowed them by the court they may be unfortunate, but there is no contention here that the amount of fees allowed by the probate court was too small. While the court had no power to fix and apportion the attorneys' fees, it did have the power to allow the executors represented by Messrs. Galpin & Bolton four thousand dollars incurred as attorneys' fees, and the executor represented by Gartland one thousand dollars incurred as attorneys' fees.

Taking the accounts, the decree and the findings together, we hold this to be the effect of the decree and order as to attorneys' fees.

In *Estate of Brignole*, 133 Cal. 163, [65 Pac. 294], in the final settlement the court below allowed seven hundred and fifty dollars on account of legal services rendered two of the executors, and the same amount to the third executor, who had not employed the same attorney. The order was affirmed.

In *Estate of Dudley*, 123 Cal. 256, [55 Pac. 897], it was held that where two sisters were jointly administratrices of an estate, and unfriendly, each employing different attorneys, the trial court properly allowed to each a reasonable sum as attorneys' fees.

In *In re Delaphine's Estate*, 3 N. Y. Supp. 202, it was held that where two executors each employed an attorney each was entitled to be reimbursed for his attorney's fees incurred in good faith. The court said: "The deceased person must be held to have contemplated, not only the possibility of differences of opinion among his executors, but the extreme probability that such differences would arise. In such an event it surely cannot be held that one shall submit to the

other; that he shall subordinate to the other his own honest conception of a proper line of policy and official duty. There can be no doubt, either, but that it is the plain duty of the executors to honestly strain after harmony in all respects affecting the welfare of the estate. On such appearing to be the history of their official acts, there can be no difficulty in disposing of any question of the expense of their administration. . . . After qualification they would stand equal before the law, and in the precise attitude that the deceased wished and expected when he named them in the will; and except for misconduct they could not be removed, nor their powers, as set out in their letters of appointment—the will—be limited or restricted. . . .

“Both executors were entitled to the assistance of good lawyers. They employed them, and promised, under the obligations of a lawful contract, to pay them proper compensation, and such compensation has been ascertained, and they have been paid. The sums so paid in this case appear to have been fully earned, and whether really the services of either or both the attorneys for the respective executors were or were not beneficial to the estate does not signify on the question under consideration. . . .

“I have no difficulty in holding . . . that they are each entitled to be reimbursed out of this estate for the sums paid by them respectively to their respective attorneys.”

If appellants' contention in this case be correct, then two of three, or three of five, executors could entirely ignore the minority, and not even allow such minority the assistance of counsel. If three executors should each honestly differ with the others, and each employ counsel of his own selection, which one would be entitled to his attorneys' fees? It is true that in such cases the estate may be put to more expense for attorneys' fees, but that was for the deceased to consider in making his will. Certainly a testator who appoints three friends in whose judgment and integrity he confides does not intend that one of them shall be ignored and denied costs which are allowed to the others.

Counsel for appellants rely on section 1355 of the Code of Civil Procedure which provides that “where there are more than two executors or administrators, the act of a majority is valid.” The language quoted refers to the acts under the

will, or in relation to the trust, as is shown by reading the entire section. It does not mean that the act of the majority can deprive one of the executors or administrators of the assistance and advice of counsel.

The order allowing the accounts is affirmed in all respects.

Harrison, P. J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 13, 1905.

[No. 64. Third Appellate District.—October 14, 1905.]

PHILIP WOLF & CO., Appellants, v. KING & STARRETT,
Respondents.

CONTRACTS—LETTERS—PROPOSAL AND CONSENT—QUESTION OF LAW.—

It is a question of law for the court whether letters constitute a contract between the parties. In order to constitute a binding contract thereby there must be a proposal squarely assented to by an unqualified acceptance. A qualified acceptance, varying in terms from those proposed, is a rejection of the proposal, and constitutes a new proposal; and there is no contract where there is a lack of mutual consent by agreement "upon the same thing in the same sense."

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. A. G. Burnett, Judge.

The facts are stated in the opinion of the court.

A. Heynemann, and W. F. Cowan, for Appellants.

Butts & Weske, for Respondents.

CHIPMAN, P. J.—Action to recover damages for the breach of an alleged contract for the sale of hops by defendants to plaintiffs. The court found that no contract was entered into between the parties, as alleged in the complaint,

or at all, and defendants had judgment. Plaintiffs appeal from the judgment and from the order denying their motion for a new trial.

The judgment of this court entered on September 30, 1905, was vacated and set aside for the reasons that, upon suggestion of diminution of the record made before submission of the cause, but not called to the attention of the court when the opinion was being written, the notice of intention to move for a new trial was shown to have been duly served, the motion for a new trial duly heard and denied by the court, and that the appeal was taken within sixty days after judgment was rendered. It therefore becomes unnecessary to consider the points made by respondent based upon the nonappearance of the foregoing facts.

The sole question in the case is, as suggested by appellants in their reply brief (now before this court, but which was not in the record when cause was submitted on the August calendar of this court, although claimed by appellants to have been filed with the supreme court on April 4, 1905): Did the correspondence between the parties constitute a contract?

On May 22, 1903, plaintiffs wrote defendants (who are hop-growers) offering fifteen cents per pound for twenty thousand pounds of hops in advance of the harvest. On May 28th defendants replied, saying among other things not material: "We have concluded to accept your offer, provided you will put up one thousand dollars cash inside of thirty days, without interest, and the balance when the hops are in bale." On May 29th plaintiffs replied: "We have your favor of yesterday and now note that you accept our offer of 15c for 20,000 pounds of your coming crop, and for which inclose contracts which sign and return one of them to us. This is the same form of agreement signed by the various Santa Rosa growers when [whom is doubtless meant] we have contracted with. As to the freight, will arrange the same as we did with our last purchase. The \$1,000 is ready whenever and how you may want it, and free from interest." On June 2d one of the defendants replied: "The contract does not suit Mr. Starrett [the other defendant]. He will be down in a week or ten days and arrange matters with you." Mr. Starrett called at plaintiffs' office on July 2d and talked the mat-

ter over with plaintiffs, but no agreement was reached then or at any other time, except as may be derived from the above correspondence.

In the case of *Wristen v. Bowles*, 82 Cal. 84, [22 Pac. 1136], the court dealt with the principles governing contracts entered into by correspondence. Briefly summarized, these principles are: That it is for the court to determine whether letters which have passed between parties constitute an agreement between them; that to constitute a binding contract made in this form there must be a proposal squarely assented to; if the acceptance be not unqualified, or go to the actual thing proposed, there is no binding contract; that a proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer; that an offer imposes no obligation unless accepted upon the terms proposed and the acceptance must be absolute and unqualified, for, if qualified, it is a new proposal. (See, also, *Pacific etc. Co. v. Riverside etc. Ry. Co.*, 90 Cal. 627, [27 Pac. 525]; *Harney v. Duffey*, 99 Cal. 401, [33 Pac. 897]; *Niles v. Hancock*, 140 Cal. 157, [73 Pac. 840]; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, [79 Pac. 366]; Civ. Code, sec. 1580.)

Guided by the principles above set forth, it is quite clear to our minds that the consent of the parties to the same subject-matter in the same sense is not shown by the correspondence. In replying to plaintiffs' letter of May 22d, defendants did not submit an absolute and unequivocal acceptance, but coupled it with a new condition. Plaintiffs responded by accepting the condition, but in turn coupled their acceptance with what we think must have been intended as a still further condition, namely, that defendants execute the contract inclosed with plaintiffs' letter of acceptance, which bore plaintiffs' signature. Plaintiffs by their language indicated that they accepted defendants' offer on condition that they execute the contract inclosed, and that defendants so understood the acceptance is shown by the letter of June 2d, written by one of the defendants to plaintiffs. The contract sent by plaintiffs to defendants for their execution contained conditions other than those mentioned in the correspondence, and, considered as part of plaintiffs' acceptance, constituted a new proposal to which it is not pretended that defendants ever consented. There was then no contract, for

lack of mutual consent by agreement "upon the same thing in the same sense." (Civ. Code, sec. 1580.)

The judgment and order are affirmed.

McLaughlin, J., and Buckles, J., concurred.

[No. 59. Third Appellate District.—October 16, 1905.]

ENNIS BROWN COMPANY (a Corporation), Respondent,
v. W. S. HURST & CO., Copartners, Appellants.

ACTION FOR BREACH OF CONTRACT—SALE OF POTATOES—LETTERS—PROPOSAL AND ACCEPTANCE.—In an action for damages for breach of a contract to sell and deliver two carloads of potatoes the question whether the correspondence between the parties showed the existence of the alleged contract is one of law for the court; and to show a binding contract it must appear that defendant's proposal was unqualifiedly accepted by the plaintiff, without any condition amounting to a new proposal.

ID.—REQUEST FOR SHIPMENT—UNCERTAINTY AS TO CONDITIONS—CIRCUMSTANCES AND CONDUCT OF PARTIES—CONSTRUCTION OF CONTRACT.—Where there is uncertainty or ambiguity as to whether plaintiff intended to make a request as to the shipment of the potatoes a new condition of his acceptance of defendant's proposal to deliver them, the court may look to the surrounding circumstances and subsequent conduct of the parties to discover whether such uncertainty was not removed or waived. In such case the contract must be interpreted in the sense in which defendant believed that plaintiff understood it.

ID.—RELATION OF ACCEPTANCE TO PROPOSAL—IDENTITY OF LANGUAGE NOT ESSENTIAL.—It is not essential to the acceptance of defendant's proposal that plaintiff should use the same identical language used in the proposal. Any form of expression showing clearly an intention to accept on the terms proposed or to consent to the same subject-matter in the same sense is sufficient if coupled with no new conditions.

ID.—PART PERFORMANCE—STATEMENT OF FURTHER INABILITY TO PERFORM CONTRACT NOT QUESTIONED.—Where the defendant partly performed the contract, and without questioning its existence put his further failure to perform upon the sole ground that he could not procure the quantity of potatoes agreed to be sold, the plaintiff had the right to assume that defendant understood plaintiff's acceptance as plaintiff understood, as constituting a contract between them.

ID.—NOTICE OF CANCELLATION FOR INABILITY—READINESS TO PAY NOT REQUIRED.—Defendant having notified the plaintiff of his inability to perform and of having canceled the contract, plaintiff was not called upon to show its ability or readiness to pay.

ID.—AMENDMENT OF COMPLAINT AFTER SUBMISSION.—The court could permit an amendment of the complaint after the evidence had been closed and the cause submitted and taken under advisement and before decision, to cover a variance in the proof by which the defendant could not be misled, and in respect of which defendant did not request permission for further evidence nor make any showing that the amendment would result to his injury.

ID.—EVIDENCE—MARKET VALUE OF POTATOES.—Where the contract called for delivery of the potatoes from Anrora, Oregon, to plaintiff, residing in Sacramento, on April 20th, evidence to prove the market price of potatoes in Oregon, and the market price at Sacramento less freight from Oregon on carload lots, five days prior to that date, was not prejudicial where it appeared that the market price at no time after the 20th was less than such evidence showed, and the court adopted the lowest price at any point shown by the evidence.

ID.—USAGE—TIME AND PLACE OF PAYMENT.—Evidence was admissible to show a usage that in similar contracts payment was to be made at Sacramento after inspection of the potatoes, the seller sending a draft with a bill of lading and invoice; and it could not be prejudicial to show that such was the usage of plaintiff upon similar contracts where the potatoes were not purchased for or delivered to plaintiff.

ID.—USAGE AS TO CONFIRMATION OF SALE AFTER ACCEPTANCE—CONFLICTING EVIDENCE.—Where the evidence was conflicting as to whether there was a usage between the parties to confirm the sale after acceptance of the proposal, such usage cannot be regarded as established in opposition to the findings of the court.

ID.—WAIVER OF USAGE.—If such usage existed, it was competent for the parties to waive or disregard it, and it is sufficient that the evidence shows that both parties treated the offer as accepted without further confirmation on the part of either.

APPEAL from an order of the Superior Court of Sacramento County denying a new trial. P. J. Shields, Judge.

The facts are stated in the opinion of the court.

Hinkson & Elliott, for Appellants.

White & Miller, for Respondent.

CHIPMAN, P. J.—This is an action for damages growing out of a contract alleged to have been entered into between
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the plaintiff, residing in Sacramento, California, and defendant, residing in Aurora, Oregon, for the delivery by defendant to plaintiff of certain two carloads of potatoes. The complaint alleges that on or about the fifteenth day of April, 1901, defendant entered into a contract in writing with plaintiff whereby defendant sold to plaintiff and plaintiff purchased from defendant two carloads of potatoes at the agreed price of fifty-five cents per hundred pounds, "which said two carloads of potatoes were to be within a week thereafter delivered by defendant to plaintiff." The complaint further alleges demand for the delivery and neglect and failure upon the part of defendant to comply therewith, resulting to plaintiff's damage in the sum claimed in the complaint. There was a demurrer interposed by defendant on the ground of insufficiency of facts, which was overruled, and defendant answered, denying specifically the material allegations of the complaint. As a separate answer defendant alleged that he was at all times mentioned in the complaint absent from and was a non-resident of the state of California, and is and was a resident of the state of Oregon, and that no personal service of summons was ever made upon him other than by publication thereof. It is further alleged in the answer that all the transactions and negotiations and writings that took place between plaintiff and defendant consist of letters and telegrams exchanged between them and did not and do not constitute a contract between defendant and plaintiff. The court found that on the thirteenth day of April, 1901, the defendant "doing business under the firm name of W. S. Hurst & Company entered into a contract in writing with plaintiff whereby the said defendant sold to plaintiff and plaintiff purchased of said defendant two carloads of potatoes at the agreed price of fifty-five cents per hundred pounds which said two carloads of potatoes were to be delivered by defendant to plaintiff within a week thereafter"; that plaintiff demanded delivery thereof, but defendant refused and neglected to deliver the same, to plaintiff's damage in the sum of four hundred and twenty dollars; "that said defendant based his refusal to deliver said potatoes solely upon the ground that no potatoes were to be had; that speculators and buyers had bought up all potatoes which could be found and that lots which defendant had bought had fallen short and defendant was unable for those reasons to deliver the potatoes to plaintiff."

As conclusions of law the court found that plaintiff is entitled to judgment for the sum above named and judgment was thereupon duly entered. Defendant moved for a new trial, which was denied, and he appeals from the order upon bill of exceptions. The contract in question rests upon the letters and telegrams exchanged between the parties, and an understanding of the questions involved requires that this correspondence should be fully set forth. On Saturday, April 13, 1901, plaintiff sent the following telegram to defendant: "Wire lowest two cars choice Burbanks free from disease shipment next week." This telegram was followed by letter of the same date from plaintiff to defendant, as follows:

"Your letter of 10th inst. at hand and contents carefully noted. We note that you are shipping potatoes north. Suppose they are for the Alaskan trade. We telegraphed you to-day 'wire us lowest two cars choice Burbanks, free from disease. Shipment next week,' and now confirm the same, and we hope to receive your reply in a short time. If your price is reasonable we will order two more cars for shipment next week." Plaintiff received from defendant at 8:20 p. m. the same day, dated at Aurora, Oregon, the following reply: "Offer two cars choice Burbanks, fifty-five cents net, f. o. b. Oregon, from Aurora, C. F. X. nineteen six eight one." The concluding words of the telegram "from Aurora," etc., refer to car of the number stated, which was one of a three-car lot of potatoes previously ordered. On the same day (April 13th) defendant wrote to plaintiff, following this telegram of that date reading: "Inclosed find invoice and shipping receipt for first car of three sold you at 47½ cents net f. o. b. cars here in Oregon. We have your wire requesting lowest price on two cars more and wired you to-night offering two cars at fifty-five cents net f. o. b. Oregon. We are buying up potatoes at several points and do not know where we will ship any certain car from so make our prices good for any point along the line. We have your favor giving shipping instructions and will try to have cars follow each other five days apart. We ship with vents open as required." The shipping instructions referred to in the last clause of the above letter manifestly must refer to previous instructions relating to other cars given in the letter dated April 11th, found in the record. The next day, April 14th, was Sunday, and on Monday, April

15th, the following telegram was sent by plaintiff to defendant: "Accept offer two cars choice Burbanks fifty-five cents see letter shipping instructions." And on the following day, April 16th, plaintiff wrote defendant as follows: "Received your telegram yesterday offering two cars choice Burbanks fifty-five cents net f. o. b. Oregon, from Aurora C. F. X. nineteen six eight one. We immediately wired you 'accept offer two cars choice Burbanks fifty-five cents see letter shipping instructions,' and now confirm the same. Please ship one of these cars the latter part of this week and the other car the first of next week and please see that we get strictly choice stock." On April 17, 1901, plaintiff wrote to defendant acknowledging receipt on that day of the car previously referred to as number 19,681, and called attention to a few sacks that were of poor quality, and stating "wish you would see that the balance of our potatoes are of good size and well graded and choice potatoes. Do not ship us anything that is not properly graded." The letter also called attention to short weights of potatoes in the car and stated that defendant must make allowances for shrinkage, closing as follows: "We trust the balance of your potatoes will be all right and that the weights will hold out." On April 18, 1901, plaintiff wrote defendant stating that a draft for the car numbered 19,681 had been presented and paid that day, and said: "We expect you to make the shrinkage good on the cars you ship later." On April 19, 1901, defendant mailed a letter to plaintiff inclosing invoice of the second car of potatoes going forward that day and acknowledging receipt of plaintiff's letter of April 17th, and stating that defendant is selling the potatoes f. o. b. cars in Oregon, and that he does not think he should stand the shrinkage. Among other things, he said: "We think you will find this shipment runs better than the first car. All of our potatoes now come in small lots and it is impossible except in rare instances to have car lots run even that is all of one lot. We are obliged to take several different lots to make up a car. Potatoes are getting scarce and we find we were a little too fast in selling you three cars at 47½ cents, but will make shipments just the same." The next day, April 20th, plaintiff sent the following telegram: "Wire lowest two cars choice Burbanks free from disease. Answer quick." To which de-

defendant replied on the same day by telegraph: "No spuds to offer to-day getting scarce." On the same day plaintiff wrote to defendant stating that it had telegraphed for prices on potatoes, acknowledging the receipt of his answer of the same day, and concluded the letter as follows: "Should you have a car or two to offer by Monday or Tuesday please wire us your lowest price. We hope by that time you will be able to scrape up one or two cars." Defendant on the same day, April 20th, wrote to plaintiff: "We are practically out of the market for potatoes and do not care to sell any more until we get cleaned up on what we have sold. Should we have any later on we will write or wire you." On April 24th plaintiff wrote defendant as follows: "As we haven't heard from you suppose you have no more potatoes to offer. Should you have a car or two to offer we would be pleased to have you wire us your lowest price on receipt of this letter." On April 30th plaintiff telegraphed defendant: "Wire car number date shipment last car also quote lowest prices three cars choice Burbanks. Answer quick." May 1, 1901, defendant telegraphed: "Shipped 24th S. P. 38570 none to offer now." On the same day, May 1st, plaintiff telegraphed defendant: "Our records show two more cars to be delivered fifty-five cents hundred f. o. b. when will you ship answer quick." On the same day defendant telegraphed to plaintiff: "No potatoes to be had. Have canceled order. See letter." On Sunday defendant wrote plaintiff: "Your wires at hand. We are sorry to be compelled to cancel your last order for two cars of potatoes at 55 cents per 100. We have had a hard time to find the potatoes to fill the first order of 3 cars. We find that speculators and buyers from Portland have gone out and bought up every lot of potatoes that could be found, and now it is impossible to pick up any potatoes at all. This with the great falling short of lots that we had bought has made it utterly impossible for us to continue shipping. So we are practically out of the market for this season." There were some later letters, but they were excluded by the court.

In the case of *Wolf v. King*, *ante*, p. 749, [82 Pac. 1055], we had occasion to state briefly the rules or principles governing contracts entered into by written correspondence, as follows: "It is for the court to determine whether letters which have passed between the parties constitute an agreement be-

tween them; to constitute a binding contract made in this form, there must be a proposal squarely assented to; if the acceptance be not unqualified, or go to the actual thing proposed, there is no binding contract; a proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer; an offer imposes no obligation, unless accepted upon the terms proposed and the acceptance must be absolute and unqualified, for if qualified, it is a new proposal." See cases there cited.

Appellant claims that there were two material particulars in which plaintiff's acceptance differed from its original proposal: First, the time of shipment was changed from two cars during the week following April 13th, to one car that week and one car the first of the week thereafter; and, second, the quality of the potatoes was changed from "choice" to "strictly choice." It will be noticed that in plaintiff's letter of April 16th the offer of defendant is confirmed in the exact terms stated by him. Following this absolute confirmation plaintiff requests that defendant ship the first car that week and the second the beginning of the following week, which might have been complied with by no greater delay from the offer and acceptance than a day, for he could have shipped the first car on Saturday of the first week and the second on the following Monday. The trial court manifestly did not regard this request as introducing any new or material condition into the transaction or changing its effect in any material respect. Defendant had offered two cars for delivery f. o. b. that week, extending to Saturday, and the request could have been complied with, as just suggested, by sending one car that day and one car on the following Monday. Defendant's telegram of April 15th was an absolute acceptance and completed all the essential elements of a contract, and the letter following the telegram on the 16th was of similar import unless the request as to the shipment of the potatoes, and the request that "strictly" choice potatoes be shipped constituted a new proposal or a rejection of the first one. An instructive case as to when a request, following an absolute acceptance, will be regarded as a modification of a proposal, is found in *Turner v. McCormick*, 56 W. Va. 161, [107 Am. St. Rep. 801, 49 S. E. 28].

If there was uncertainty or ambiguity as to whether plaintiff meant to make the request as to shipment a new condi-

tion we may look to the surrounding circumstances and to the subsequent conduct of the parties to discover whether such uncertainty was not removed or waived. (Civ. Code, sec. 1647; Code Civ. Proc., secs. 1860, 1870, subd. 12.) In such case the contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, sec. 1649.) There can be no doubt but that if defendant had shipped the potatoes plaintiff would have been bound to receive them. At this time plaintiff and defendant were dealing with each other in the same commodity. There was a contract for three carloads of potatoes then being filled, and but one of these was ready for delivery; the second one did not go forward until April 19th, and the third not until May 1st. During this time defendant appears to have been endeavoring to find potatoes and plaintiff was endeavoring to place with him additional orders. On April 20th defendant wrote plaintiff in reply to an inquiry for more potatoes: "We are practically out of the market for potatoes and do not care to sell any more until we get cleaned up on what we have sold"; and on May 1st, in reply to plaintiff's inquiry as to the two cars in question, defendant telegraphed: "No potatoes to be had. Have canceled order. See letter." On the same day defendant wrote plaintiff: "Your wires at hand. We are very sorry to be compelled to cancel your last order for two cars of potatoes at 55 cents per 100. We had a hard time to find potatoes to fill the first order of 3 cars." The letter explains that the reason why defendant could not comply was because others "had gone out and bought up every lot of potatoes that could be found," and also because "the great falling short of lots we had bought has made it impossible for us to continue shipping." These letters and telegrams justify the inference that defendant was endeavoring to comply with his contract, and when explaining his inability to do so he did not put his failure on the ground that there was no contract, but upon the sole ground that he could not procure the potatoes for the reasons stated. When he spoke of canceling plaintiff's "order" he must have referred to the contract in question, which he did not cancel until May 1st. His letter of April 20th will bear the construction that he had in mind the two cars as among the potatoes sold to plaintiff. We think plaintiff had

the right to assume that defendant understood plaintiff's acceptance as plaintiff understood it, and the contract "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, sec. 1649.) As already observed, defendant, in his telegram and letter of May 1st, for the first time mentions that he has canceled the order, and on the sole ground found by the court. This, together with other facts appearing, would justify the inference that defendant had all along treated the contract as subsisting, and that plaintiff had relied on its being performed by defendant.

Defendant having notified plaintiff of his inability to perform and of having canceled the contract, plaintiff was not called upon to show its ability or readiness to pay. (*Pierce v. Lukens*, 144 Cal. 397, [77 Pac. 996].) It is urged that the failure of plaintiff to call attention to the unfilled contract shows that it was not relying on these two cars under the contract, and gives rise as much to an inference against plaintiff as defendant's silence does against him. But it may be answered that defendant had not, up to May 1st, completed the delivery of the three cars and was meanwhile doing all he could to find potatoes for shipment. Plaintiff might well infer that the contract for the two cars would be taken up as soon as the three cars were delivered, and as soon as they were delivered plaintiff reminded defendant of the unfilled contract for the cars in question.

As to the claim that the request that defendant "see that strictly choice stock" is shipped was a change in the original proposal, there might be force in the contention if it could be said that on the face of the letter the word "strictly" was unmistakably intended to designate a potato of different grade from one denominated as "choice," or if, by usage of the trade, there was a recognized grade of "strictly choice." We do not think, however, that requesting plaintiff to see that it got strictly choice stock was anything more than a caution that defendant would see that the potatoes came up to the grade agreed upon. Witness Brown testified as to the grades of potatoes then in the Oregon market: "There are three grades, good, or field run, choice and fancy. A good potato or field run potato is a potato just as it comes from the ground, that is, not graded; a choice potato is one that is

graded, some of the poorer ones thrown out, but not graded as close as fancy. Fancy potatoes are all the finest ones selected. There was no difference at that time between a potato designated as choice and one designated as strictly choice." Witness, on cross-examination, was asked why he used the words "strictly choice" if they meant the same as choice. The reply was that the word "strictly" was used "to designate just what we want, to impress it, so a man would not make any mistake in delivering something not up to choice grade." And this would seem to be no more than the natural import of the word as it was used.

Appellant claims that the acceptance must be identical with the offer as well as unconditional (citing 9 Ency. of Law & Prac., subd. 2, p. 267); and that if the offer is to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either an expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. If it be meant by "identical" that the language of the acceptance must be absolutely identical we cannot agree with appellant. Any form of expression showing clearly an intention to accept on the terms proposed,—i. e., a consent to the same subject-matter in the same sense, would be sufficient if not coupled with some new condition, or new term implying a new condition, and of this the court must judge in giving interpretation to the correspondence.

The court could permit an amendment of the complaint after the evidence had been closed and the cause had been submitted and taken under advisement and before decision. (*Maionchi v. Nicholini*, ante, p. 690, [82 Pac. 1052]; *Lee v. Murphy*, 119 Cal. 364, [51 Pac. 549].) The court recited in its order that by the amendment "defendants were not in any manner misled by the variance between said pleadings and proofs and that said variance is immaterial." Defendant did not ask to have the case reopened in order to enable him to submit additional evidence, made necessary by the amendment, nor did he by affidavit or otherwise show that the amendment would result to his injury unless the case was reopened and he given opportunity to present further evidence.

It is claimed that the court erred in allowing plaintiff to prove the price of potatoes after April 15th; and also to prove

the price at Sacramento. The evidence went to the price in Oregon and also in Sacramento, less freight from Oregon on carload lots. The contract as found by the court called for delivery as late as April 20th. The market price at no time after the 20th was less than the evidence showed, and as the court adopted the lowest price at any point shown by any of the evidence plaintiff was not injured by showing the price at Sacramento.

The motion for nonsuit was rightly denied. Immediately after the motion was denied plaintiff obtained leave to reopen his case and no motion for nonsuit was thereafter made. There was sufficient evidence when the motion was made to go to the jury. The point that the court was without jurisdiction of the person of defendant was not well taken, for he appeared by demurrer and answer and submitted himself to the jurisdiction of the court.

Error is urged because the court permitted plaintiff to prove when and how the potatoes were to be paid for and that each car was to be inspected at Sacramento before the draft for its payment was made. It is perhaps not apparent why this evidence was admitted unless it was to meet a claim that delivery and payment were to be made in Oregon f. o. b. cars. The evidence was that in previous similar contracts payment was made at Sacramento after plaintiff had inspected the potatoes, the seller sending draft with bill of lading and invoice, and this was the usage, as the evidence showed. In no event can we see that the evidence could have been prejudicial. The potatoes were not in fact purchased for or tendered to plaintiff in Oregon or elsewhere.

We have endeavored to dispose of the points made in appellant's brief, and find no prejudicial error in the record.

The order is affirmed.

Buckles, J., and McLaughlin, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on November 14, 1905, and the following opinion was then rendered:—

CHIPMAN, P. J.—In his petition for a rehearing appellant calls attention to one point urged in the opening brief which was not noticed in the opinion, *namely*, that a custom

and usage prevailed between plaintiff and defendant and between plaintiff and other persons in Oregon with whom it had dealings, to the effect that the sale was not complete until plaintiff's acceptance of the seller's offer was confirmed by the latter. There was evidence tending to establish the custom as claimed by defendant, but there was evidence the other way sufficient to produce a conflict. Besides, if there had been a usage between the parties in former dealings it could be disregarded or waived by them in any particular transaction. We think the evidence in the present case shows that both parties treated the order as accepted without further confirmation on the part of either.

We have re-examined the other questions and do not find error in our former conclusions. We think appellant disposed, in his argument, to overlook the force of the rule where the evidence in the case is conflicting.

Rehearing denied.

Buckles, J., and McLaughlin, J., concurred.

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ACCOUNTING. See Partnership; Trust, 1.

AGENCY. See Assignment, 4-7; Conversions, 1, 2; Corporations; Warehouseman.

ALIMONY. See Divorce, 2-4.

APPEAL.

1. **DISMISSAL—FAILURE TO FILE BRIEF—SUBSEQUENT FILING.**—A motion to dismiss an appeal for failure to file the appellant's brief within the time limited therefor must be determined by the facts existing when notice of the motion was given, and the right to a dismissal cannot be affected by the subsequent filing and service of the brief where no sufficient showing is given to excuse the delay. (*Santa Rosa Bank v. Striening*, 515.)
2. **DISTRICT COURTS OF APPEAL—JURISDICTION—TRANSFER TO SUPREME COURT.**—An appeal involving the enforcement of a judgment for more than two thousand dollars is not within the jurisdiction of the district courts of appeal, and if taken thereto will be transferred to the supreme court, to which it should have been taken. (*Weldon v. Rogers*, 388.)
3. **ARGUMENT—REVIEW.**—An appellate court will consider only the assignments of error discussed in the appellant's brief, and will not prosecute an independent inquiry to find out reasons for or against the correctness of other rulings. (*Humphrey v. Pope*, 374.)
4. **REVIEW CONFINED TO RECORD—RELATION OF DATE OF AFFIRMANCE.**—In determining the correctness of a judgment appealed from, this court is limited to a consideration of the record thereof, and error of the trial court cannot be predicated by reason of any matter subsequent to its rendition. If the judgment is affirmed, it is as of the date of its rendition. (*People's Home Savings Bank v. Sadler*, 189.)
5. **DEATH OF APPELLANT—SUBSTITUTION OF EXECUTORS—IMPROPER MOTION TO REMAND CAUSE.**—Where the appellant has died pending the appeal, a motion by his substituted executors to remand the cause to the superior court upon the ground that the judgment is incapable of enforcement for want of presentation of it as a claim against the estate of the deceased appellant is improper and will be denied. (*Id.*)
6. **ENFORCEMENT OF JUDGMENT—PROVINCE OF COURT—PROBATE JURISDICTION.**—The enforcement of the judgment or the right to with-

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hold it is primarily within the jurisdiction of the court in which it was rendered. Upon the death of the appellant the power of the court to enforce the judgment by execution against him terminated, and the respondent is remitted for its collection to the probate jurisdiction having charge of appellant's estate, and to that court the executors must present any defense they may have to its payment of the assets of that estate. (Id.)

7. **INEFFECTUAL APPEAL FROM JUDGMENT—DISMISSAL.**—Where an attempted appeal from the judgment was not perfected until after the lapse of one year from the rendition of the judgment, it is ineffectual and must be dismissed. (Cox v. Odell, 682.)
8. **APPEAL FROM NEW TRIAL ORDER—REVIEW—FINDINGS.**—Upon appeal from an order denying a new trial only, the sufficiency of the findings to support the judgment cannot be considered, and the only inquiry as to the findings is whether they are supported by the evidence. (Burns v. Schoenfeld, 121.)
9. **APPEAL FROM JUDGMENT—EXPIRATION OF TIME—DISMISSAL.**—An appeal from a judgment taken more than six months after its entry must be dismissed. (Michaelson v. Fish, 116.)
10. **MOTION TO DISMISS—LAW OF CASE.**—Where a motion to dismiss an appeal on the ground that the order appealed from was not appealable was denied, the order denying it is the law of the case, and a subsequent motion to dismiss the appeal on the same ground cannot be granted, but the appeal must be determined upon its merits. (Murphy v. Stelling, 95.)
11. **JURISDICTION IN PROBATE MATTERS.**—Appellate jurisdiction in probate proceedings is limited to such probate matters "as may be provided by law," and does not extend to any cases not enumerated in section 963 of the Code of Civil Procedure. (Estate of Bouysou, 657.)
12. **NON-APPEALABLE AND APPEALABLE ORDERS—VACATING REFUSAL OF PROBATE—VACATING APPOINTMENT OF ADMINISTRATOR.**—An order vacating an order refusing probate of a will is non-appealable, and an appeal therefrom will be dismissed; but an order vacating the appointment of an administrator is appealable, and a motion to dismiss an appeal therefrom will be denied. (Id.)
13. **ORDER SINGLE IN FORM—DISTINCT PROCEEDINGS—DISTRIBUTIVE CONSTRUCTION.**—An order single in form granting a "motion to vacate order refusing probate of will and appointing administrator," relates to wholly distinct proceedings, and is to be construed distributively, as containing separate non-appealable and appealable orders. (Id.)
14. **ACTION FOR BROKERS' COMMISSIONS ON SALE OF REALTY—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.**—In an action to recover brokers' commissions on the sale of real estate, where the court found, upon substantially conflicting evidence, that the property

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was sold, and that the sale resulted through the efforts of the plaintiffs, such finding will not be disturbed upon appeal. (*Grunsky v. Field*, 623.)

15. **STIPULATION—SUBMISSION UPON RECORD OF FORMER JURY TRIAL—REPORTER'S NOTES—EXCEPTIONS NOT RESERVED OR REVIEWED.**—A stipulation that the cause be submitted to the court for decision upon the record of a former trial before a jury as shown by the reporter's notes taken upon such former trial, without expressing any reservation of rulings and exceptions taken upon the former trial, does not require the trial court to review them; and in the absence of any showing that the trial court actually passed thereon, the appellant from its decision cannot have them reviewed in this court. (*Id.*)
16. **DUTY OF APPELLANT—PRESUMPTIONS UPON APPEAL—INTENT OF STIPULATION—ABSENCE OF CONSENT OF COURT.**—It is the duty of the appellant to show error affirmatively, and every intendment is in favor of the action of the trial court; and where it is not clearly apparent from the record that the parties and the court understood that the stipulation included exceptions formerly taken, it must be presumed that nothing of the kind was intended, and that the court did not consent thereto,—the parties being powerless to make up a new record based upon the former rulings without the consent of the court. (*Id.*)
17. **ERROR REMOVED BY CONSENT—ESTOPPEL OF APPELLANT.**—He who consents to an act is not wronged by it; and acquiescence in error takes away the right of objecting to it. In the absence of an express agreement to that effect sanctioned by the trial court, the appellant will not be allowed to predicate error on a record to which he has consented. (*Id.*)

See Criminal Law, 9, 10, 87, 95; Eminent Domain, 9; Estates of Deceased Persons, 3, 26-28, 34, 48, 49; Guardian and Ward, 2; Judgment, 6, 8; Liens, 3; Mechanic's Lien, 2; New Trial, 1, 6, 7; Nuisance, 10; Pleading, 2.

ASSAULT. See Criminal Law, 7-10.

ASSIGNMENT.

1. **CHARTER OF VESSEL—CONTRACT FOR LUMBER.**—A contract to charter a vessel, and by the owners to furnish lumber for freight at a fixed price per thousand, is assignable without the consent of the owners. Although the assignor is not released by the assignment from the burden of the contract, the assignee takes all of the rights of the assignor thereunder. (*Freese v. Moore*, 587.)
2. **CONSIDERATION OF ASSIGNMENT—OBLIGATION OF ASSIGNEE.**—Where the assignee as a recharterer, in consideration of the assignment, agreed to pay a higher than the contract rate to the assignor,
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- he is under an implied obligation to carry out the contract purchased, and to act in good faith with the assignor. (Id.)
3. **BREACH OF DUTY BY ASSIGNEE—RELEASE OF OWNERS—NEW CHARTER.**—Where as the result of the breach of duty by the assignee to comply with the terms of the contract, the owners assumed to cancel it, and the assignee thereafter without the assignor's consent released the owners from the original contract, and took a new and different contract, though such release concludes the assignor, the assignee is directly liable to him for the consideration agreed to be paid, and cannot evade such liability by reason of the release or of the failure of the owners through his fault to carry out the original contract. (Id.)
 4. **ACTION FOR RENT—LEASE IN NAME OF AGENT—PAYMENT OF RENT TO PRINCIPAL.**—An agent authorized to execute a lease and to cause rents to be paid to the principal who executes it in his own name without any title in himself, and who has directed the rent to be paid to the principal, who received it until the property was sold to the tenant's wife, cannot maintain an action in his own name to recover rent. (*Niles v. Gonzales*, 324.)
 5. **EVIDENCE OF AGENCY.**—A lease formerly made by the principal to the same tenant, her receipt of the rent, her contract with the plaintiff, and her deed to the tenant's wife were all competent as tending to establish the agency alleged in the answer, the authority of the principal, and its exercise by the plaintiff as agent (Id.)
 6. **ESTOPPEL OF TENANT—PROOF OF AGENCY OF LESSOR.**—The proof of the agency of the lessor for a principal not named in the lease was not in furtherance of an attempt of a tenant to dispute a landlord's title. (Id.)
 7. **ESTOPPEL OF AGENT AND PRINCIPAL.**—The acts of the agent in representing himself only as agent for the principal, and declaring that he was executing the lease for her, and in not asserting ownership in himself, but directing the rent to be paid to her, estops him to deny that the lease was her contract, and that in executing it his intention was to bind her, and her authority for the lease and reception of rent accordingly would estop her from denying an execution in her behalf. (Id.)
 8. **CONTRACT TO COLLECT CITY BONDS—HALF INTEREST OF ATTORNEY—SALE OF OWNER'S INTEREST IN JUDGMENT—SECOND ASSIGNMENT AS COLLATERAL—CONDITIONAL PROMISE OF ATTORNEY.**—Where the owner of city bonds contracted with an attorney to collect them for a one-half interest, and absolutely sold and assigned all his interest in the judgment rendered in payment of a canceled note, but subsequently assumed to assign his interest in the original contract as collateral security for his note to a third person, and directed the attorney to pay the note out of any money which may be due him under the contract: *Held*, that a conditional promise by

ASSIGNMENT (Continued).

the attorney that, should any money come into his hands payable to the maker of the note, he would out of such funds pay the note, does not render the attorney liable by its terms, as no money coming into his hands could be so payable. (Knoll v. Melone, 637.)

9. **OWNERSHIP OF COLLATERAL—LIEN—RIGHTS OF PLEDGOR.**—An assignment by way of collateral security for the payment of a note creates only a lien, and confers no title, which remains in the pledgor, who may at any time extinguish all rights under the assignment by simply paying the note. (Id.)
10. **PRIOR NOTICE OF SECOND ASSIGNMENT—NOTE BARRED BY STATUTE—EXTINGUISHMENT OF LIEN—RIGHTS OF PRIOR ASSIGNEE.**—The fact that no notice was given to the attorney of the prior assignment of the owner's half interest in the judgment before prior notice had been given of the assignor's assignment of the original contract (which had become merged in the judgment) by way of collateral security, is not material, where it appears that, long before any money was collected, the lien in favor of the payees of the note became extinguished by the lapse of time in which an action could be brought on the note, and that the prior assignee of the judgment, as a purchaser thereof for value, became absolutely entitled to any money that might be collected on the judgment under the interest of the assignor, discharged of any lien in favor of such payees. (Id.)

See Insurance, 5-7; Surety, 2.

ATTACHMENT.

1. **CONTRACT MADE AND PAYABLE OUT OF STATE.**—The right to an attachment in this state is purely statutory, and does not extend to a contract made out of the state and which does not expressly provide for payment in this state. (Drake v. De Witt, 617.)
2. **CONTRACT FOR COMMISSIONS EARNED IN ANOTHER STATE—PRESUMPTION AS TO PLACE OF PAYMENT.**—A contract to pay commissions on sales to be made by plaintiff in another state, executed and performed in such other state, must be presumed to intend that payment is due where the contract was made and the services were rendered. (Id.)

See Conversion, 1.

ATTORNEYS AT LAW. See Contract, 16-21.

BAIL-BOND.

1. **ACTION UPON UNAUTHORIZED BAIL-BOND—CHARGE OF CRIME IN POLICE COURT—BOND FIXED BY CLERK—SAN FRANCISCO CHARTER—PENAL CODE.**—An action cannot be sustained upon a bail-bond given to secure the appearance of a person accused of the crime of grand larceny in the police court of the city and county of San Francisco, where the amount of the bond was fixed solely by the warrant and bond clerk of that court. There is no authority given to such clerk by the San Francisco charter to fix the amount of such a bond;

BAIL-BOND (Continued).

and the Penal Code provides a complete scheme for admitting to bail persons charged with crime, under which the order fixing the amount of bail must be made by a court or magistrate. (*City and County of San Francisco v. Hartnett*, 652.)

2. **BOND ABSOLUTELY VOID.**—Where the amount of a bail-bond in a criminal case has been fixed, or the bail-bond has been accepted or approved, by an officer not authorized by law so to do, the bail-bond is absolutely void, and cannot be sustained as a common-law bond. (*Id.*)

BAILMENT. See *Lien*, 1, 2.

BANKS.

1. **TRANSFER OF SHARES—ASSUMPTION OF LIABILITY BY TRANSFEREE.**—Upon the transfer of shares of stock in a bank and the acceptance of certificates issued therefor, the transferee assumes the liability to the bank for the unpaid amount thereof to which the original owners were subject. (*People's Home Savings Bank v. Sadler*, 189.)
2. **BY-LAWS—GENERAL POWER OF BANK—INHERENT RIGHT—RESTRICTIONS—ENUMERATION OF POWERS NOT EXCLUSIVE.**—A bank as a private corporation has a general power and inherent right incidental to its creation to enact by-laws for its internal government and to regulate the conduct, rights, and duties of its members, independently of legislative declaration, and subject only to legislative restrictions. The enumeration of powers to make by-laws contained in section 303 of the Civil Code does not restrict such general power and inherent right. (*Id.*)
3. **BY-LAW FOR ACTION UPON CALLS—CONTRACT—WAIVER OF ASSESSMENT.**—A by-law providing for the enforcement of unpaid calls is within the general power of the bank, and a provision for enforcement thereof by action binds all consenting stockholders; and where all of the stockholders agreed to the by-laws by signature thereto, such contract is a waiver of the right to insist that the corporation shall levy assessments therefor, as provided in the Civil Code, and may be enforced by the bank according to its terms. (*Id.*)
4. **CONSIDERATION OF CONTRACT BY TRANSFEREE.**—The admission of a transferee of stock to the privileges of a member of the corporation, with the right to participate in its proceedings and to receive dividends upon his shares of stock, is a sufficient consideration for the agreement with the corporation by signature to its by-laws. (*Id.*)
5. **PROVISION FOR LIEN UPON STOCK—FORECLOSURE NOT REQUIRED.**—A provision in the by-laws giving the bank a lien upon the stock for unpaid calls does not create a mortgage requiring foreclosure under section 726 of the Code of Civil Procedure; and the bank may enforce the payment of the indebtedness by action without any foreclosure of the lien. (*Id.*)

BOND. See Bail-Bond; Liens, 3, 4.

BRIBERY. See Criminal Law, 11-15.

BROKERS.

1. **ACTION FOR BROKER'S COMMISSION—MEMORANDUM OF AGREEMENT—DESCRIPTION OF LAND—PLEADING—LOCATION AND IDENTIFICATION—DEMURRER.**—In an action by a real-estate broker to recover commission on the sale of land under a written memorandum sufficient under the statute of frauds, but describing the property by name and acreage only, the complaint, after setting forth such memorandum *in haec verba*, properly made additional averments to locate and identify the property. Neither a general demurrer to such complaint, nor a special demurrer for ambiguity and uncertainty on the ground of variance from the memorandum pleaded, is sustainable. (Hill v. McCoy, 159.)
2. **PAROL EVIDENCE.**—Parol evidence was admissible to prove such identifying averments at the trial. Parol evidence is always admissible to identify land referred to by name in a contract. (Id.)
3. **CURE OF RULINGS AGAINST EVIDENCE.**—Rulings against the admissibility of evidence are, if erroneous, cured by the further full testimony of the witness to the same matters. (Id.)
4. **SUPPORT OF FINDING—EARNING OF COMMISSION—TERMS FIXED BY OWNER.**—Where the contract provided for commission at a certain rate for procuring a sale upon terms fixed by the owner, a finding that plaintiff earned the commission sued for by procuring a purchaser with whom he sought to negotiate a sale, which was finally made by the owner upon terms fixed by him without plaintiff's knowledge during the life of the agreement, is sufficiently supported, notwithstanding conflict in the evidence, where the trial court might reasonably infer as a fact that the sale was effected through plaintiff's agency as its procuring cause. (Id.)
See Appeal, 14.

BURGLARY. See Criminal Law, 16-20.

CERTIORARI.

LIMITATIONS OF WRIT.—The writ of *certiorari* only goes to the question of jurisdiction or authority of an inferior tribunal, board, or officer exercising judicial functions where there is no other adequate remedy. It is not a writ of error, nor can it be used to determine the sufficiency of evidence to sustain a decision complained of if made within the limits of jurisdiction. (McKenzie v. Board of Education, 406.)

See Justice's Court, 1, 4-6.

CHARTER PARTY. See Assignment, 1-3.

COLLATERAL INHERITANCE TAX. See *Estates of Deceased Persons*, 7.

COMMON CARRIERS. See *Railroad*.

COMMUNITY PROPERTY. See *Divorce*, 5.

CONSTITUTIONAL LAW. See *Counties*, 3; *Criminal Law*, 11-13; 51-55; *Injunction*, 3; *Jury and Jurors*, 1, 2; *Mechanic's Lien*, 1; *Municipal Corporations*, 3; *Street Assessments*, 5; *Streets, Roads, and Highways*, 1.

CONTEMPT.

PROHIBITION—CONTEMPT PROCEEDINGS BY JUSTICE OF THE PEACE—DEPOSITION OF WITNESS IN SUPERIOR COURT—REFUSAL TO OBEY SUBPOENA—JURISDICTION.—A deposition of a witness to be taken in an action pending in the superior court is a proceeding in that court which can alone punish a disobedience to a subpoena for such witness, and a justice of the peace before whom the deposition is taken has no jurisdiction to punish such disobedience as a contempt, and prohibition will lie to restrain the justice from so doing. (*Gay v. Thorpe*, 312.)

CONTRACTS.

1. **ACTION FOR BREACH OF CONTRACT—SALE OF POTATOES—LETTERS—PROPOSAL AND ACCEPTANCE.**—In an action for damages for breach of a contract to sell and deliver two carloads of potatoes the question whether the correspondence between the parties showed the existence of the alleged contract is one of law for the court; and to show a binding contract it must appear that defendant's proposal was unqualifiedly accepted by the plaintiff, without any condition amounting to a new proposal. (*Ennis Brown Company v. W. S. Hurst & Co.*, 752.)
2. **REQUEST FOR SHIPMENT—UNCERTAINTY AS TO CONDITIONS—CIRCUMSTANCES AND CONDUCT OF PARTIES—CONSTRUCTION OF CONTRACT.**—Where there is uncertainty or ambiguity as to whether plaintiff intended to make a request as to the shipment of the potatoes a new condition of his acceptance of defendant's proposal to deliver them, the court may look to the surrounding circumstances and subsequent conduct of the parties to discover whether such uncertainty was not removed or waived. In such case the contract must be interpreted in the sense in which defendant believed that plaintiff understood it. (*Id.*)
3. **RELATION OF ACCEPTANCE TO PROPOSAL—IDENTITY OF LANGUAGE NOT ESSENTIAL.**—It is not essential to the acceptance of defendant's proposal that plaintiff should use the same identical language used in the proposal. Any form of expression showing clearly an intention to accept on the terms proposed or to consent to the same

CONTRACTS (Continued).

- subject-matter in the same sense is sufficient if coupled with no new conditions. (Id.)
4. **PART PERFORMANCE—STATEMENT OF FURTHER INABILITY TO PERFORM CONTRACT NOT QUESTIONED.**—Where the defendant partly performed the contract, and without questioning its existence put his further failure to perform upon the sole ground that he could not procure the quantity of potatoes agreed to be sold, the plaintiff had the right to assume that defendant understood plaintiff's acceptance as plaintiff understood it, as constituting a contract between them. (Id.)
5. **NOTICE OF CANCELLATION FOR INABILITY—READINESS TO PAY NOT REQUIRED.**—Defendant having notified the plaintiff of his inability to perform and of having canceled the contract, plaintiff was not called upon to show its ability or readiness to pay. (Id.)
6. **AMENDMENT OF COMPLAINT AFTER SUBMISSION.**—The court could permit an amendment of the complaint after the evidence had been closed and the cause submitted and taken under advisement and before decision, to cover a variance in the proof by which the defendant could not be misled, and in respect of which defendant did not request permission for further evidence nor make any showing that the amendment would result to his injury. (Id.)
7. **EVIDENCE—MARKET VALUE OF POTATOES.**—Where the contract called for delivery of the potatoes from Aurora, Oregon, to plaintiff, residing in Sacramento, on April 20th, evidence to prove the market price of potatoes in Oregon, and the market price at Sacramento less freight from Oregon on carload lots, five days prior to that date, was not prejudicial where it appeared that the market price at no time after the 20th was less than such evidence showed, and the court adopted the lowest price at any point shown by the evidence. (Id.)
8. **USAGE—TIME AND PLACE OF PAYMENT.**—Evidence was admissible to show a usage that in similar contracts payment was to be made at Sacramento after inspection of the potatoes, the seller sending a draft with a bill of lading and invoice; and it could not be prejudicial to show that such was the usage of plaintiff upon similar contracts where the potatoes were not purchased for or delivered to plaintiff. (Id.)
9. **USAGE AS TO CONFIRMATION OF SALE AFTER ACCEPTANCE—CONFLICTING EVIDENCE.**—Where the evidence was conflicting as to whether there was a usage between the parties to confirm the sale after acceptance of the proposal, such usage cannot be regarded as established in opposition to the findings of the court. (Id.)
10. **WAIVER OF USAGE.**—If such usage existed, it was competent for the parties to waive or disregard it, and it is sufficient that the evidence shows that both parties treated the offer as accepted without further confirmation on the part of either. (Id.)

CONTRACTS (Continued).

11. **LETTERS—PROPOSAL AND CONSENT—QUESTION OF LAW.**—It is a question of law for the court whether letters constitute a contract between the parties. In order to constitute a binding contract thereby there must be a proposal squarely assented to by an unqualified acceptance. A qualified acceptance, varying in terms from those proposed, is a rejection of the proposal, and constitutes a new proposal; and there is no contract where there is a lack of mutual consent by agreement "upon the same thing in the same sense." (Philip Wolf & Co. v. King & Starrett, 749.)
12. **AMENDMENT NOT GERMANE—ACTION TO RESCIND VOIDABLE CONTRACT—IMPROPER CHARGE OF VOID CONTRACT.**—An action to rescind a contract for unfair advantage taken of plaintiff while an old man, enfeebled in mind and body, by a defendant in whom plaintiff had implicit confidence, proceeds upon the theory that the contract was not void, but voidable, and it was error, merely because admissible evidence of unsoundness of mind was introduced, to order an immediate amendment after submission, not germane to the cause of action, to charge that the contract was absolutely void, because made while plaintiff was entirely devoid of understanding. (Maionchi v. Nicholini, 690.)
13. **CODE DISTINCTION BETWEEN VOID AND VOIDABLE CONTRACTS—JUDICIAL DECLARATION OF INCAPACITY.**—Sections 38 and 39 of the Civil Code recognize and enforce the well-settled distinction between pleading and proof as to a void contract with a person judicially declared incompetent, and a voidable contract with a person of unsound mind, not entirely devoid of understanding, before incapacity is judicially determined. (Id.)
14. **UNSUPPORTED AMENDMENT AND FINDINGS.**—Where there was no evidence that when the contract was made the plaintiff was entirely devoid of understanding, both the amendment and findings in favor thereof are unsupported by the evidence. (Id.)
15. **ABSENCE OF FINDINGS UPON ISSUES—JUDGMENT FOR RESCISSION UNSUPPORTED.**—Though the evidence was sufficient to sustain a judgment for rescission, yet where the court failed to find upon issues of fact tendered by the answer upon that cause of action, a judgment for rescission cannot be supported. (Id.)
16. **ASSUMPSIT FOR LEGAL SERVICES—SUFFICIENCY OF COMPLAINT—IMPLIED PROMISE—AVERMENT NOT REQUIRED.**—A complaint in *assumpsit* for legal services which alleges that the legal services were performed at the special instance and request of the defendant, and states what they were reasonably worth, is not demurrable for not alleging that defendant promised to pay what the services were reasonably worth. It is never necessary to allege a promise where the law implies one. (Cusick v. Boyne, 643.)
17. **SERVICES OF ATTORNEY—ABSENCE OF AGREEMENT AS TO PAYMENT—RECOVERY OF REASONABLE VALUE.**—When an attorney per-

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- forms services for another, at his instance and request, nothing being said as to payment, the attorney is entitled to recover the reasonable value of his services. (Id.)
18. EVIDENCE—VALUE OF SERVICES—LITIGATION—SECURING LIFE ESTATE—MONTHLY RENTAL—MORTALITY TABLE—EXPECTANCY OF LIFE.—It is always competent in a controversy as to the value of legal services, to prove the nature of the litigation and the amount involved; and where it is shown that, as the result of the litigation, a life estate was secured, evidence is admissible to show its monthly rental, and to show by the tables of mortality the average expectancy of life of a person of the age of the defendant at the time when the litigation was terminated, as a circumstance tending to show the value of the legal services. (Id.)
19. PRESUMPTION OF AVERAGE HEALTH AND STRENGTH—BURDEN OF PROOF.—The defendant is presumed to be of the average condition of health and strength of other persons of the same age, and the plaintiff was not required in the first instance to prove that fact, before proving the tables of mortality; but if for any reason the health of defendant was such that she would be taken out of the general rule, it was incumbent upon her to prove it. (Id.)
20. STATED ACCOUNT—PROPER INSTRUCTION—HYPOTHETICAL STATEMENT OF FACTS.—Where there was evidence in the case tending to support it, the court properly instructed the jury that if they should find from the evidence that a statement of account was remitted by plaintiff to the defendant at time stated, and that its items were then fully explained by plaintiff, and that more than three months elapsed without any objection being made by the defendant the account became an account stated, the items of which were no longer open to inquiry in the absence of allegation and proof of fraud or mistake. Such instruction is not on any matter of fact, but properly submits a hypothetical statement of facts, upon which the law is stated as applicable thereto. (Id.)
21. SPECIAL CONTRACT—MATTER OF DEFENSE—INSTRUCTIONS AS TO BURDEN OF PROOF.—Where the defendant pleaded a special contract that if plaintiff was successful in the action he was to be paid what his services were reasonably worth, but if he failed he was to make no charge and receive no compensation, the court properly instructed the jury that the burden was on the defendant to prove the special contract alleged, and that unless she established it by a preponderance of evidence, her defense founded upon such special contract would fail entirely. If the evidence were evenly balanced as to such special agreement, it would not take the case out of the rule that valuable services performed for defendant by plaintiff at defendant's request must ordinarily be paid for. (Id.)
22. CONTRACT TO REMOVE MORTGAGE LIEN—ACTION FOR BREACH—SUFFICIENCY OF COMPLAINT.—A complaint in an action upon a contract executed by a husband and wife to remove a mortgage lien, which

CONTRACTS (Continued).

alleges that the mortgage was fraudulently executed by the husband under a power of attorney from plaintiff executed for a different purpose, that he appropriated the proceeds to his own use, that the contract was executed to prevent legal proceedings by plaintiff against the husband, that the contract was broken, and that plaintiff's title was lost under foreclosure of the mortgage, and claiming damages for its alleged value, states a cause of action. (*Parsons v. Silva*, 602.)

23. **CONSIDERATION—FORBEARANCE—MONEY RECEIVED AND APPROPRIATED.**—The complaint shows a sufficient consideration for the contract sued upon, both in the agreement to forbear legal proceedings against the husband in regard to the iniquitous transaction alleged and to the money received and appropriated by the husband to his own use. (*Id.*)
24. **SUPPORT OF FINDINGS—RESPONSIBILITY OF HUSBAND—CONFLICTING EVIDENCE.**—Where there is evidence tending to support all of the findings for the plaintiff, and the evidence was substantially conflicting as to whether the husband or an attorney associated with him in business, and who prepared the papers, received the money, but the testimony of the latter, that he received the check and that the money was immediately turned over to the defendant husband, taken in connection with the fact that defendants by signing the contract sued upon acknowledged the husband's liability to remove the mortgage-lien, amply sustains the finding for plaintiff on that question. (*Id.*)
25. **LEGAL LIABILITY OF PLAINTIFF ON MORTGAGE—EQUITABLE LIABILITY OF DEFENDANT.**—It is immaterial whether plaintiff by giving a power of attorney to raise funds on mortgage to carry on an appeal, if taken, and not to be used unless the appeal was taken, of which notice to the contrary was given, made herself legally liable to the mortgagee. It is sufficient that as between herself and her attorney in fact she was not in equity bound by it, but he was, and acknowledged himself to be so bound by executing the agreement sued upon. (*Id.*)
26. **ASSUMPSIT—CONFLICTING EVIDENCE—SUPPORT OF FINDINGS.**—In an action of *assumpsit*, where there is a substantial conflict in the evidence, and findings for the plaintiff are supported by sufficient evidence tending to sustain them, this court will not interfere with the action of the trial court. (*Doe v. Allen*, 560.)
27. **FINDING AS TO DATE.**—A finding that the promise was made on or about the date alleged in the complaint is sufficiently sustained by evidence that it was made on that date, and conflicting evidence that it was made on the day next previous thereto. The court was not required to choose absolutely between the two dates. (*Id.*)
28. **ORIGINAL VERBAL PROMISE—CONSIDERATION—STATUTE OF FRAUDS.**—A verbal promise by a purchaser who had paid the purchase money on a cargo of coal consigned to him, to pay the freight to the

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carrier if it should be delivered free of lien for the freight (which the agents of the consignor had failed to pay) and on faith of which promise the carrier delivered the cargo, is an original promise resting upon a consideration beneficial to the promisor, and is not required to be in writing under sections 1624 and 2794 of the Civil Code. (Id.)

29. NOTE — ILLEGAL CONSIDERATION — LOBBYING CONTRACT — PUBLIC POLICY.—A promissory note given to raise money for the purpose of carrying out a contract between the maker and payee for lobbying is given for a contract against public policy, which renders the consideration illegal. (*Le Tourneux v. Gilliss*, 546.)
30. DEFINITION OF "LOBBYING."—The term "lobbying" has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body in the lobby or elsewhere for the purpose of influencing their votes. The term is not used in any good sense. (Id.)
31. PENAL OFFENSE NOT MATERIAL.—It is not material that the contract does not provide for acts to be done within the penal provisions of the constitution and the Penal Code. It is sufficient that it was the object and purpose to provide means to enable the maker of the note to carry on the business of lobbying. It is not the policy of the law that the members of the legislature during the session should be subjected to the personal solicitation of experienced and paid lobbyists. (Id.)
32. CONTRACTS NOT AIDED BY COURTS.—Courts will not permit themselves to be used for the purpose of aiding or enforcing such contracts, and this cannot be made the basis of any action, legal or equitable. (Id.)
33. TRANSFER OF ILLEGAL NOTE—PRESUMPTION—BURDEN OF PROOF.—Where it is clearly proved that the consideration of the note was illegal and that the payee was a party to the illegal contract, and the note is sued upon by a transferee of the payee, the law presumes that the transferee suing upon the note stands in the shoes of the payee, and the burden of proving a *bona fide* purchase for value without notice rests upon the holder. (Id.)
34. ORDER GRANTING NEW TRIAL—SURPRISE—MISTAKE OF LAW.—An order granting a new trial on account of the surprise of the holder, which consists only of a mistake of law as to the burden of proof, which was supposed to rest on defendant, to prove that plaintiff was not a *bona fide* holder for value, cannot be justified. (Id.)
35. TRIAL—PARTIES AT SWORDS' LENGTH.—Upon the trial of a cause the parties are at swords' length, and each one relies upon his own knowledge of the law, and the evidence which he deems essential. (Id.)
36. LACHES—APPLICATION AFTER JUDGMENT.—One who would apply for relief on the ground of mistake of law, must apply before judg-

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ment to have the submission set aside upon terms, and it is too late to make the application after decision and judgment, as ground for new trial. (Id.)

37. **PRESUMPTION IN FAVOR OF ORDER—ABUSE OF DISCRETION.**—Though in general all presumptions are in favor of an order granting a new trial, yet where it is granted without any legal reason for so doing the court's discretion has been abused. (Id.)
38. **CONTRACT TO SELL ELECTRIC POWER—PERSONAL PROPERTY—PRICE NOT PAID—MEASURE OF DAMAGES.**—A contract to sell electric power for five years is a valid contract to sell personal property, and where the price is not paid in advance the measure of damages for breach of the contract is the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled. (*Terrace Water Company v. San Antonio Light and Power Company*, 511.)
39. **PLEADING—ADMISSIBILITY OF EVIDENCE—PRESUMED NOTICE OF LEGAL DAMAGES—MINIMUM DAMAGES.**—Damages resulting from the act complained may be proved under the *ad damnum* clause of the complaint. The defendant must be presumed to be aware of the damages fixed by law for the violation of his contract, and where no special damages were claimed or allowed the court properly allowed the minimum of damages resulting from the procurement from another at a higher price of what the defendant had failed to deliver at the stipulated price. (Id.)
40. **ESTOPPEL OF DEFAULTING PARTY.**—The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and his outlay fairly incurred. (Id.)
41. **RESCISSION—INCOMPETENT PERSONS.**—The contract of a person whose mind was so impaired as to be incapacitated for transacting business, but who was not entirely without understanding, may be rescinded; and such right of rescission includes the defensive right, if the other party seeks by action to enforce the contract, to set up and establish such matters as would justify a decree of rescission. (*Dunlap v. Plummer*, 426.)
42. **INCOMPETENT JOINT MAKER OF NOTE.**—A joint maker of a promissory note, which was given for an antecedent debt due from the other maker to the payee, who signed the note in ignorance of that fact and when he was mentally incapacitated from transacting business, is entitled either to sue for a rescission of the contract or to set up such right to a rescission as a defense to an action on the note brought by an assignee who paid no consideration for the assignment. (Id.)
43. **CONTINUANCE—DEPOSITION NOT RETURNED.**—It is error to refuse a continuance asked for by the defendant in an action on such note in order to procure the deposition of an absent witness, by whom

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alone his mental incompetency could be established, if the affidavit for the continuance was sufficient in form and due diligence had been used in the attempt to procure the deposition. (Id.)

44. **BUILDING CONTRACT—SUBSTANTIAL COMPLIANCE—INDEPENDENT PROMISE—DEFECTS IN STAIRWAY—MEASURE OF DAMAGES—IMPROPER EVIDENCE—COST OF NEW STAIRWAY.**—In an action against the owners of a building by contractors to recover the balance due on the contract, and for extra work, where plaintiffs had substantially complied with the contract, which contained an independent promise to pay before the commencement of the work, and where it appeared that alleged defects in a stairway could be remedied at moderate cost, the measure of damages therefor is merely the detriment suffered from breach of the contract. It was error for the court to admit evidence of the cost of a new stairway, and to render judgment therefor, as a measure of damages against the plaintiffs. (Carpenter v. Ibbetson, 272.)
45. **ACTION UPON CONTRACT FOR PLAINTIFF'S BENEFIT—SALE BY WIDOW AND HEIR—AGREEMENT AS TO PAYMENT.**—In so far as a contract for the payment of a certain sum as the price of property sold by the widow and sole heir at law of her deceased husband to the defendant, in excess of a sum paid to the defendant, was made expressly for the benefit of the plaintiff as a creditor of the estate, to whom defendant agreed that it should be paid, the contract is enforceable by the plaintiff. (Peters v. George, 239.)
46. **TIME OF PAYMENT.**—No time for performance of the contract of sale being specified therein, the money was payable immediately. (Id.)
47. **RELEASE OF ESTATE IMMATERIAL.**—It being no part of the contract that the payment to the plaintiff was to depend upon a release of the estate from his claim as a creditor thereof, it is immaterial whether he executed such release or established it by proof. (Id.)
48. **STATUTE OF FRAUDS.**—The statute of frauds is inapplicable to the agreement of defendant to pay the plaintiff a part of the price of the property sold. (Id.)
49. **CONTEMPORANEOUS CONSTRUCTION BY PARTIES.**—The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms. (Baldwin v. Napa and Sonoma Wine Co., 215.)
50. **ACTION FOR BREACH OF CONTRACT TO SELL WINES—AGREED DELIVERY PRO RATA—ESTOPPEL OF PLAINTIFF.**—In an action for breach of a contract executed in March of the first year to sell and deliver wines, of which the defendant buyer agreed to take a specified number of gallons each year before September 1st, where the parties by agreement delivered and accepted a *pro rata* number of gallons as a completion of the first year's contract, the plaintiff cannot afterward be allowed to claim a breach for non-delivery of the specified number of gallons before September 1st in that year. (Id.)

CONTRACTS (Continued).

51. BREACH BY PLAINTIFF—NEW TRIAL.—Where the evidence fails to show a breach of the contract by the defendant, and shows that plaintiff himself was guilty of a breach in refusing to deliver wine called for by the contract, a verdict for the plaintiff was properly set aside and a new trial granted. (Id.)
52. ACCOUNT OF PLAINTIFF—IMPROPER DEMAND OF PAYMENT—NOTICE OF CANCELLATION.—The plaintiff had no right to render an account and demand payment for wine agreed to be sold and which plaintiff had reserved for other parties, nor to demand payment for a greater number of gallons on the first year's contract than had been agreed to, nor to notify defendant that plaintiff would cause defendant's right to be canceled under the contract unless payment of the account was promptly made. (Id.)
53. INSTRUCTION IGNORING AGREEMENT.—The court erred in giving an instruction for the plaintiff which ignored the agreement by the parties for *pro rata* sale and delivery in completion of the first year's contract. (Id.)
54. IMPROPER MODIFICATION OF REQUEST—REFUSAL TO DELIVER WINES.—The defendant had the right to have the jury instructed that plaintiff had no right to refuse to deliver any of the wines mentioned before the expiration of a contract year, provided they were within the amount called for by the contract; and it was error to modify a request to that effect by changing its substance. (Id.)
55. ACTION UPON CONTRACT—TRANSPORTATION OF LABORERS—CONFLICTING EVIDENCE—APPEAL.—In an action upon a contract to pay for the transportation of laborers, where the evidence is conflicting as to whether the number of laborers were to be paid for who were placed on wagons and stages and waybilled to the camps of the defendant, as claimed by plaintiff, or whether it was the number of men delivered at the camps and received by the defendant, and the court found in favor of plaintiff, the finding will not be disturbed upon appeal. (*Idol v. San Francisco Construction Company*, 92.)
56. ACCOUNT-BOOK—ORIGINAL ENTRIES—COPIES FROM WAYBILLS—IMMATERIAL ERROR—INDEPENDENT EVIDENCE.—An account-book kept by the plaintiff, in so far as it contained original entries as to the number of men transported, was admissible in his favor; though where, after a certain date, the names were copied therein from the waybills, the waybills constituted the original entries. But any error in admitting the book as to such copies instead of the waybills was immaterial, where there was independent uncontradicted evidence of the transportation of a specified number of men for which plaintiff was not paid. (Id.)

See Assignment; Attachment; Banks, 3, 4; Conversion, 4; Counties, 1, 2; Estates of Deceased Persons, 14-17, 19; Municipal Corporations, 4, 5; Sale; Specific Performance; Vendor and

Vendee.

CONVERSION.

1. **CONVERSION OF CATTLE—AGENCY—TITLE OF PRINCIPAL—ATTACHMENT AND SALE IN HANDS OF AGENT.**—In an action for the conversion of cattle by the defendant, where it appears from the evidence that plaintiff employed an agent to buy and sell cattle, whose compensation out of the profits was to be applied to pay the agent's debt to the plaintiff, the plaintiff's title is established, and an attachment of the cattle in the hands of the agent, and a sale thereof to the defendant as the agent's property, for a debt of the agent to the defendant, established a conversion, entitling the plaintiff to recover. (*Nicholls v. Mapes*, 349.)
2. **PURCHASE WITHOUT DISCLOSING PRINCIPAL.**—The fact that the agent purchased the cattle in controversy from a third party without disclosing the principal, the purchase having been made out of the funds of the principal, cannot affect the title of the principal against third parties. (*Id.*)
3. **IMPROPER DAMAGES FOR PURSUIT OF PROPERTY—ATTORNEY'S FEES—COST OF DEPOSITIONS.**—Attorney's fees are not recoverable in an action for conversion, as damages incurred in the pursuit of the property under section 3336 of the Civil Code, nor as costs in the action. The cost of taking depositions forms no part of the damage, and should be determined in the cost-bill. (*Id.*)

WAIVER OF TORT—ASSUMPSIT.—Where personal property has been wrongfully taken and converted, the owner has his election to sue in tort for the conversion or he may waive the tort and sue in *assumpsit*, on an implied contract to pay the reasonable value of the property. (*Fountain v. City of Sacramento*, 461.)

See Judgment, 9.

CORPORATIONS.

1. **ACTION AGAINST FOREIGN CORPORATION—STATUTE OF LIMITATIONS—FAILURE TO DESIGNATE AGENT.**—Under the act of 1872, and the act of 1899 amendatory thereof, a foreign corporation doing business in this state which fails to file with the secretary of state its designation of some person residing in the county of its principal place of business upon whom process shall be served cannot defend an action on the ground that it is barred by the statute of limitations. (*Black v. Vermont Marble Company*, 718.)
2. **PLEA OF STATUTE—ADMISSION OF PLEADINGS—BURDEN OF PROOF.**—Where it was admitted by the pleadings that defendant is a foreign corporation, and it pleaded the statute of limitations, the plea being deemed controverted by section 462 of the Code of Civil Procedure, the burden is upon the defendant in order to avail itself of the defense to show that it had complied with the statute by filing the required designation with the secretary of state. (*Id.*)
3. **DESIGNATION PENDING SUIT—PROTECTION OF STATUTE—TIME OF RUNNING.**—Where the foreign corporation designated an agent pending suit, such designation is only prospective from its date

CORPORATIONS (Continued).

as to the protection of the statute of limitations, and it cannot avail itself of any defense as to the running of the statute prior thereto. (Id.)

See Banks; Municipal Corporations; Warehouseman.

COSTS. See Conversion, 3; Estates of Deceased Persons, 25.

COUNTIES.

1. **TWO CONTRACTS WITH COUNTY—CLAIM AND PAYMENT UPON ONE—ESTOPPEL OF CLAIMANT—MANDAMUS.**—Where the same company had two contracts with a county, one of an earlier date for a heating plant, and one of later date for a ventilating plant, for the county hospital, and a verified claim upon the heating plant was allowed and paid, the company is estopped from showing that the amount received upon its verified claim was not a payment upon the heating plant, and was intended to be a claim upon the ventilating plant, and *mandamus* will not lie to compel a first payment upon the heating plant. (Russell-Vail Engineering Company v. Kirby, 707.)
2. **SUPPORT OF JUDGMENT—REFUSAL OF MANDAMUS—QUESTIONS NOT CONSIDERED.**—Where the findings support the judgment refusing the writ of mandate, this court will affirm it without inquiring as to the validity or effect of either of the contracts, or the relation between them. (Id.)
3. **POWER OF SUPERVISORS—APPORTIONMENT AND COMPENSATION OF HEALTH OFFICER—CONSTITUTIONAL LAW.**—Under section 11 of article XI of the constitution and under the general provisions of the County Government Act of 1897, the board of supervisors of a county have the power, by necessary implication, to appoint an expert medical employee as health officer, and to fix his compensation and order it paid out of the county treasury. It is immaterial whether or not the legislature transcended its powers under the constitution in the express provision of subdivision '0 of section 25 of the County Government Act upon that subject. (Valle v. Shaffer, 183.)
4. **APPOINTEE NOT A COUNTY OFFICER.**—The health officer appointed by the board is to be deemed an employee, and not a county officer. (Id.)

See Ordinance.

COURTS. See Appeal, 2; District Courts of Appeal; Justice's Court; Police Court.

CRIMINAL LAW.

1. **HABEAS CORPUS—INSUFFICIENT COMPLAINT FOR DISTURBING PEACE.**—A complaint for disturbing the peace and quiet of complainant on certain streets in a town by then and there using vulgar and

CRIMINAL LAW (Continued).

profane language in the presence and hearing of said complainant and in the presence and hearing of women and children on the said streets is insufficient to state a public offense in that it does not charge that it was done "in a loud and boisterous manner," nor state anything to connect the language used with "offensive conduct." A defendant held under such complaint is entitled to be discharged upon *habeas corpus*. (Ex parte Boynton, 294.)

2. EVIDENCE—IMPEACHMENT OF WITNESS.—The impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony; and to permit the introduction of such testimony is prejudicial to the party against whom it is received. Particularly is this the rule where there is nothing to show that the witness did not have the same motive or interest to deceive when he made the confirmatory statement that he may have had when he testified to the fact. (People v. Turner, 420.)
3. HEARSAY.—In a prosecution for larceny a witness cannot testify to a conversation had with a third person, the effect of which was to convey the impression that such third person had told the witness that the defendant was one of the parties engaged in the stealing. Such testimony is hearsay. (Id.)
4. ACCUSATION IN PRESENCE OF DEFENDANT.—In such prosecution evidence of a statement made by the prosecuting witness in the presence of the defendant, that the defendant was one of the persons concerned in the stealing, is inadmissible if the defendant at the time denied the charge. (Id.)
5. INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.—In a criminal prosecution it is error to instruct the jury without qualification that "where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been." (People v. Taggart, 423.)
6. ERROR WITHOUT PREJUDICE.—The giving of such instruction, although erroneous, will not warrant a reversal where the circumstantial evidence of the defendant's guilt was entirely uncontradicted, and was, if not absolutely conclusive, at least "satisfactory" in the sense of that term as defined in the Code of Civil Procedure, —to wit, such as "ordinarily produces moral certainty or conviction in an unprejudiced mind." (Id.)
7. ASSAULT TO COMMIT RAPE—SIMPLE ASSAULT.—On a prosecution for an assault to commit rape the defendant may be convicted of a simple assault. In the present case the evidence is sufficient to sustain the verdict of simple assault. (People v. Green, 432.)

CRIMINAL LAW (Continued).

8. INSTRUCTIONS WITHOUT PREJUDICE.—On such a prosecution, where the defendant was convicted of simple assault, instructions relating only to the higher offense, whether erroneous or otherwise, are without prejudice. (Id.)
9. ASSAULT WITH DEADLY WEAPON—APPEAL FROM JUDGMENT ALONE—INSTRUCTION—REVIEW OF EVIDENCE.—Upon appeal from a judgment of conviction of an assault with a deadly weapon, upon a bill of exceptions, where there was no motion for a new trial, if there is some evidence tending to show that the weapon was deadly, and an instruction correct in law was given upon that subject, the insufficiency of the evidence to show whether the weapon was deadly cannot be reviewed. (*People v. Durand*, 71.)
10. GROUND FOR NEW TRIAL—CONSTRUCTION OF CODE—APPLICABILITY OF INSTRUCTION.—The insufficiency of the evidence is made ground for a new trial under section 1181 of the Penal Code, and included in the provisions of section 1170 or 1259 of that code. Where it appears that a correct instruction is inapplicable to any evidence in the case, it may be reviewed upon a bill of exceptions upon appeal from the judgment, and it devolves upon the district attorney to show that there is some evidence to which it is applicable. (Id.)
11. BRIBERY OF MEMBER OF LEGISLATURE—CONSTITUTIONALITY OF PENAL PROVISION—PUNISHMENT—DISFRANCHISEMENT.—Section 86 of the Penal Code, as re-enacted April 6, 1880, punishing legislative bribery as a felony, including disfranchisement as part of the punishment, is a revised and independent act, which is not subject to section 26 of article IV of the constitution. The original section was not repealed by section 35 of article IV of the constitution; and the power of the legislature to punish legislative bribery by section 86 of the Penal Code as re-enacted was not withdrawn by that section of the constitution, and the legislature properly included the additional punishment of disfranchisement established by the constitution. (*In re Bunkers*, 61.)
12. POWER OF LEGISLATURE—CONCLUSIVE PRESUMPTION.—An act of the legislature is conclusively presumed to be within its powers unless expressly prohibited by the state or federal constitution. (Id.)
13. INVESTIGATION BEFORE SENATE COMMITTEE—BUILDING AND LOAN CORPORATIONS—CORRUPT RECEIPT OF BRIBE.—The legislature has power under section 1 of article XII of the constitution and section 383 of the Civil Code to investigate the affairs of all corporations in this state; and a member of a senate committee appointed for the purpose of investigating the affairs of building and loan corporations is charged with a duty in his official capacity as a member of the senate, and if he accepts a bribe to prevent such investigation and to cast his official vote against it, he is guilty of bribery as a member of the legislature. (Id.)
14. SUFFICIENCY OF INDICTMENT—HABEAS CORPUS.—Where the indictment sufficiently charges bribery as defined by subdivision 6 of

CRIMINAL LAW (Continued).

- section 7 and by section 86 of the Penal Code, and states the offense with sufficient particularity to give the court jurisdiction of the charge, the party charged cannot for any alleged defect in the statement be discharged upon writ of *habeas corpus*. (Id.)
15. JURISDICTION OF COURT.—The superior court of Sacramento County has jurisdiction of the offense of bribery committed therein by a member of the legislature. (Id.)
16. BURGLARY IN HOUSE OF ILL-REPUTE—EVIDENCE—MISCONDUCT OF DISTRICT ATTORNEY.—Upon a prosecution for burglary, where it appeared that it was committed in the room of an inmate of a house of ill-repute, the character of which was shown by defendant, though he claimed an *alibi*, evidence was admissible to show the acquaintance of an eye-witness to the burglary with the defendant, the frequency of his visits to the house, and his familiarity with the premises, and his knowledge of the manner in which the prosecuting witness kept her money and other articles of value in her room, and the articles missed by her on the night of the burglary; and there was no misconduct of the prosecuting attorney in introducing such evidence, though it had a tendency to place the defendant in an unenviable light before the jury. (People v. Davis, 8.)
17. CROSS-EXAMINATION OF DEFENDANT—RELATIONS TO PROSECUTING WITNESS—JEALOUS RESENTMENT AS TO MARRIAGE—FAILURE TO REMOVE TRUNK.—Where the defendant on direct examination testified freely as to happenings, conduct, and conversations at the house, and as to the jealous resentment and rage of the prosecuting witness when informed of his intended marriage, as being the motive for an unfounded accusation against him, it was proper to cross-examine him as to any matter or period of time embraced in his direct examination, and to question him touching his engagement and marriage, and to show his failure to remove his trunk from that house. (Id.)
18. ARGUMENT OF DISTRICT ATTORNEY—REVERSIBLE MISCONDUCT NOT SHOWN.—It was not misconduct justifying a reversal for the district attorney to denounce the theory and the credibility of the defendant and severely to criticise him from his own evidence; nor to allude to the woman as of negro extraction, where the testimony shows that one was colored, and their appearance on the stand may have indicated it; nor to charge that defendant was living off the earnings of the prosecuting witness, where the defendant introduced evidence that he obtained money from her. (Id.)
19. REFUSAL OF INSTRUCTIONS—DUTY OF INDIVIDUAL JURORS.—It was not error to refuse requested instructions addressed to the duty of individual jurors. (Id.)
20. PRESUMPTION OF FAIR CHARACTER.—An instruction as to the presumption of the fair character of the defendant was properly

CRIMINAL LAW (Continued).

refused where the evidence does not warrant a presumption as to his general fair character, and the instruction was too broad in not being limited to the traits of character necessarily involved in the particular case. (Id.)

21. **REQUESTS COVERED BY CHARGE.**—It is proper to refuse requested instructions covered by the charge of the court. (Id.)
22. **PROPER INSTRUCTIONS—CRIMINAL INTENT—PROVINCE OF JURY.**—Instructions based upon the evidence and stating that the intent to commit larceny must exist at the time of the entry, and instructions merely restating the principle that jurors are the exclusive judges of the weight and sufficiency of the evidence stated elsewhere in the charge, and that their judgment as reasonable men is the test of their right to believe or disbelieve the testimony of a witness, were properly given. (Id.)
23. **OMISSION OF QUALIFICATION—INSTRUCTIONS TO BE CONSTRUED TOGETHER.**—Instructions must be taken together as a whole, and the omission of a qualification in one instruction, given at the request of the people, where the omitted qualification is plainly stated in other instructions given at the request of the defendant, could not have misled the jury. (Id.)
24. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION—CUMULATIVE EVIDENCE.**—A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the court, which is not abused in denying the motion where the newly discovered evidence is merely cumulative. (Id.)
25. **BURGLARY—INTENT TO COMMIT LARCENY—SUFFICIENCY OF EVIDENCE.**—Held that, considering the time of the entry, the clandestine manner thereof, and the precipitate flight of the defendant, though no larceny was committed, the jury were justified in finding that the entry was with the intent to commit larceny. (People v. Noon, 44.)
26. **MUTILATION OF INFORMATION—MISSING PAGE—CONTENTS NOT PROVEN—NEW TRIAL.**—Where it appears at the arraignment of the defendant that the original information contained one page more than the copy furnished the defendant, objection to which was waived, and before testimony was given it appeared that the original had been mutilated by removing a page therefrom, and no evidence was given on the hearing of objections thereto as to what the missing page contained, it cannot be said that it did not contain matter of defense or modifying the charges; and a new trial must be granted to supply proof as to its contents. (Id.)
27. **PRESUMPTION AS TO KNOWLEDGE OF DISTRICT ATTORNEY.**—As the information was signed by the district attorney and was presumably drafted by some one connected with his office, the proof of the contents of the missing page may be presumed to have been peculiarly within the knowledge of the district attorney. (Id.)

CRIMINAL LAW (Continued).

28. **JURISDICTION OF COURT ON NEW TRIAL—EFFECT OF MISSING PAGE.**—The jurisdiction of the court to retry the defendant cannot be affected if it should appear that the missing page was removed by some unknown person or was accidentally detached, and if it be shown that the matter removed does not affect what remains or is of such a nature that defendant would not be prejudiced by its removal. (Id.)
29. **CHARGE OF PRIOR CONVICTION—DISMISSAL.**—If it be clearly shown that the missing page contained an additional charge of prior conviction, such charge may be dismissed, and the trial may then proceed on the information as it now stands. (Id.)
30. **PRACTICE—CHARGES OF PRIOR CONVICTION—RECORD.**—Where the charges of a prior conviction are admitted, the proper place to show the same is in the minutes of the plea, a copy of which should be inserted in the judgment-roll; and error appears where the minutes of the plea show only the general plea of not guilty, and the jury did not return any finding upon the charge of prior conviction, although the judgment recites a conviction of five such charges. (Id.)
31. **INFAMOUS CRIME AGAINST NATURE—INSUFFICIENT INFORMATION.**—An information which does not designate the offense of "the infamous crime against nature" as defined in section two hundred and eighty-six of the Penal Code, but merely charges that the defendant did "commit the crime against nature, with and upon one Frank Derby" by "having carnal knowledge of the body of said Frank Derby" is insufficient in not alleging that Frank Derby was a male person. (People v. Carroll, 2.)
32. **SEX — JUDICIAL KNOWLEDGE — PRESUMPTION.**—Judicial knowledge cannot be taken of the sex of a party upon whom the infamous crime against nature is committed from the name alone. The presumptions are all in favor of innocence; and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged. (Id.)
33. **GRAND LARCENY—SUFFICIENCY OF INFORMATION—DESCRIPTION OF MONEY STOLEN—GROUNDS OF DEMURRER NOT SHOWN.**—An information for grand larceny which describes the property stolen as "about" eighty dollars lawful money of the United States, shows with sufficient definiteness and certainty that more than fifty dollars was stolen, as against a general demurrer, or where the record does not disclose whether the demurrer was general or special. (People v. Peltin, 612.)
34. **USE OF WORD "ABOUT"—COMMON UNDERSTANDING.**—The word "about" is frequently used as a synonym for the word "nearly" or "approximately." When a person of common understanding would readily know what is meant, and no substantial right is infringed, the information must be upheld. (Id.)

CRIMINAL LAW (Continued).

35. EVIDENCE—MONEY STOLEN FROM CASH REGISTER—MARKED, MUTILATED, AND COUNTERFEIT PIECE—POSSESSION OF DEFENDANT.—Where the money was taken from the plaintiff's cash register, which contained a marked and mutilated half-dollar piece, assuming it to be counterfeit, evidence is admissible to show the possession thereof by the defendant when arrested, as tending to connect the defendant with the commission of the offense charged. (Id.)
36. MONEY ON PERSON OF DEFENDANT—EVIDENCE OF PRIOR CONDITION.—Where money was found on the person of the defendant when arrested, evidence is admissible to show that he had no money just before the crime was committed. (Id.)
37. CREDIT OF DEFENDANT.—It was not error to exclude evidence that the credit of the defendant was good and that he could have borrowed money, in the absence of any showing that he did in fact borrow it. (Id.)
38. PRESUMPTION FROM POSSESSION—GOOD CHARACTER—REFUSAL OF REQUESTED INSTRUCTION.—It was proper to refuse a requested instruction that the presumption arising from possession alone of stolen property is removed by evidence of good character, as tending to invade the province of the jury, where the evidence of good character was not general, and was partially neutralized by circumstances in proof, such as masquerading by the defendant under an assumed name. (Id.)
39. INSTRUCTIONS BASED ON EVIDENCE OF RECENT POSSESSION—CONSTRUCTION OF INSTRUCTIONS.—An instruction as to recent possession of stolen property, based on evidence that when arrested defendant had upon his person the exact number of five-and-twenty-dollar pieces taken from the cash register, is to be taken in connection with other instructions given, which make the instructions bearing on that question a full and correct statement of the law. (Id.)
40. LARCENY—EVIDENCE OF CONSPIRACY—REASONABLE DOUBT—REQUESTED INSTRUCTION.—Upon the trial of a defendant charged with grand larceny, where the evidence showed that two other persons besides the defendant were concerned in and aided and abetted the defendant in the commission of the offense, it was proper to refuse a requested instruction that the prosecution must prove beyond all reasonable doubt, not only that the crime charged was committed, but also that the defendant and no one else committed the offense, and that in the absence of such proof the defendant must be acquitted. (People v. Roberts, 447.)
41. EVIDENCE STRICKEN OUT—REQUEST EMBODIED IN CHARGE.—A requested instruction, though proper in itself, in regard to the duty of the jury not to consider testimony stricken out by the court, was not erroneously refused where it was substantially embodied in the charge given by the court. (Id.)
42. DEFINITION OF LARCENY.—It was proper for the court in defining larceny to omit those subdivisions of section 487 of the Penal Code which have no application to the evidence. (Id.)

CRIMINAL LAW (Continued).

43. **PREJUDICIAL INSTRUCTION INAPPLICABLE TO EVIDENCE**—"FRAUD, TRICK, AND DEVICE."—It was prejudicial error tending to mislead the jury to give a lengthy instruction on the subject of larceny committed by "fraud, trick, and device," though correct in the abstract, where it was not according to the theory of the prosecution and was not responsive to any evidence tending to prove it, there being evidence only of an unsuccessful attempt so to obtain the money, in view of which the jury were probably confused by the instruction to the prejudice of the defendant. (Id.)
44. **LARCENY—FALSE PRETENSES.**—In order to constitute the crime of larceny, the owner of the money stolen must not have intended to part with the property or the money stolen; and where the evidence shows that the prosecuting witness loaned the money to the defendant, thus parting with the title and possession of it, which was secured by reason of false and fraudulent representations knowingly and designedly made, no conviction can be sustained for larceny, the crime being that of obtaining money by false pretenses. (People v. Proctor, 521.)
45. **LEWD OR LASCIVIOUS ACTS—CONSTRUCTION OF PENAL CODE—CORRECTION OF MANIFEST MISPRISION.**—The reference to "part II" in section 288 of the Penal Code, making it an offense to commit any lewd or lascivious act "other than the acts provided for in part II of this code," is manifestly a legislative oversight or clerical misprision, the true reference being to "part I." The erroneous reference will be deemed corrected under the rules of statutory construction, thus rendering the section intelligible and certain. (People v. Bradford, 41.)
46. **LASCIVIOUS ACTS UPON INFANT GIRL—COMPETENCY OF WITNESS—DISCRETION OF COURT.**—Whether or not the infant girl upon whose body the lascivious acts were charged to have been committed was an incompetent witness on account of her age was a question within the discretion of the court; and where the court determined that she was a competent witness, the weight and effect of her testimony was properly left to the jury. (Id.)
47. **PROOF OF CORPUS DELICTI.**—The *corpus delicti* was sufficiently proved by the testimony of the child with the corroborating testimony. (Id.)
- NOT PREJUDICED.**—Though the testimony of the father in relation to the characteristics of the child in respect to education, obedience, pleasure, love for pictures, and timidity with strangers might
48. **TESTIMONY OF FATHER—CHARACTERISTICS OF CHILD—DEFENDANT** well have been omitted, no prejudicial error appears in its admission. (Id.)
49. **PROOF OF VENUE.**—Though no witness testified in terms that the offense was committed within the county, yet the venue was sufficiently proved where there was evidence that it was committed within a specified township which was a legal subdivision of the

CRIMINAL LAW (Continued).

- county, and where the whole evidence left no reasonable doubt that the offense was committed in the county. (Id.)
50. **LEWD ACTS UPON CHILD—SEX OF PARTIES IMMATERIAL—SUFFICIENCY OF INFORMATION.**—An information charging the commission of lewd acts upon a child under the age of fourteen years, with the intent described in section 288 of the Penal Code, need not set forth that the defendant and the child are of opposite sexes, nor contain any statement as to the sex of the parties or either of them. It is sufficient that the information charges the offense substantially in the language of the statute. (People v. Curtis, 1.)
51. **MALICIOUS ASSAULT WITH DEADLY WEAPON BY CONVICT FOR LIFE—DEATH PENALTY—CONSTITUTIONAL LAW.**—Section 246 of the Penal Code, imposing the death penalty upon a person undergoing a life sentence in the state prison who, with malice aforethought, commits an assault upon the person of another with a deadly weapon, or by any means or force likely to produce bodily injury, is constitutional, and does not inflict any cruel or unusual punishment nor deny the equal protection of the law. (In re Finley, 198.)
52. **DOUBTS RESOLVED IN FAVOR OF VALIDITY.**—No statute is to be declared unconstitutional unless its conflict with the constitution is clear, substantial, and incapable of reconciliation; and every presumption and intendment aids, and every doubt is to be resolved in favor of, the validity of the statute assailed. (Id.)
53. **EXCEPTIONAL PENALTIES FOR EXCEPTIONAL CRIMES.**—The legislature may attach exceptional penalties to crimes which are exceptional in their nature or attended by exceptional circumstances. (Id.)
54. **DEATH PENALTY NOT CRUEL NOR DISPROPORTIONATE TO OFFENSE.**—The death penalty is not cruel *per se*; and cannot be said to be disproportionate to the offense punished by section 246 of the Penal Code. (Id.)
55. **EQUAL PROTECTION OF THE LAW—CLASSIFICATION.**—The equal protection of the law is not denied where there is a proper classification, and every one who stands in the same relation to the law is treated equally in the same manner under the same circumstances and conditions. (Id.)
56. **EXPLOSION OF DYNAMITE IN WORKING MINE—"PLACE"—"STRUCTURE"—MEANING OF STATUTE.**—A working mine in which men are employed, with its shafts, chutes, tunnels, stopes, excavated chambers, and its stulls to hold up the rock and dirt overhead, is within the act of March 12, 1887, making it a felony to explode dynamite in a "place where human beings usually . . . pass or repass," with intent to injure or destroy a "structure." (In re Mitchell, 396.)
57. **CONSTRUCTION OF PENAL STATUTES—COMMON-LAW RULE ABOGATED.**—Penal statutes not part of the Penal Code are to be construed by no different rule from that declared in section 4 of the

CRIMINAL LAW (Continued).

Penal Code, requiring its provisions "to be construed according to the fair import of their terms, with a view to effect its object and promote justice." That rule was designed to abrogate the old common-law rule that "penal statutes must be construed strictly." (Id.)

58. SUFFICIENCY OF EVIDENCE—PRELIMINARY EXAMINATION.—Where the evidence produced at the trial was amply sufficient to convict the defendant of the felony charged, it is not material that the evidence produced at the preliminary examination was not sufficient of itself to warrant a conviction. All that is necessary in order to hold the defendant to answer is that it shall appear that a public offense has been committed and that there is sufficient cause to believe the defendant guilty thereof. (Id.)
59. MURDER—CIRCUMSTANTIAL EVIDENCE—REMARKS OF JUDGE IN IMPANELING JURY—ERROR NOT PREJUDICIAL.—Where, during the impaneling of the jury, upon an information for murder, after six jurors had been accepted and sworn, and after another juror had stated on his *voir dire*, in answer to a question, that he would have to be pretty well convinced, especially in circumstantial evidence, as he had seen one case go wrong on circumstantial evidence, the remarks of the judge that "That is one case out of ten thousand," with other words to the same effect, though highly improper, were not found in an instruction to the jury, and could have no other effect than to impress upon their minds that circumstantial evidence was to be considered and that conviction could be had upon such evidence, and the error, if any, was not of a nature to injure the defendant. (People v. Olsen, 17.)
60. SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE.—Where the evidence was circumstantial, but the circumstances all point to the defendant's guilt, and were sufficient to indicate it, and defendant attempted no explanation of them, a verdict of guilty, showing that the jury must have believed him guilty beyond a reasonable doubt, is sufficiently supported. (Id.)
61. EVIDENCE—SHOES AND OVERALLS OF DEFENDANT—HUMAN BLOOD-STAINS.—The shoes and overalls of the defendant, identified as those belonging to him and worn at the time of the murder, and appearing to have human blood-stains upon them, were properly introduced in evidence over defendant's objection. (Id.)
62. EXPERT EVIDENCE—NATURE OF WOUNDS—USE OF BLUNT INSTRUMENT.—Where the physician who made the autopsy of the body of deceased described the nature of the injuries sustained as being sufficient to produce death and necessarily fatal, and described contused wounds and a bruised condition of the body, and the jury were authorized to infer from the evidence and the description of the wounds that the wounds were produced by the heels of the defendant's bloody shoes, it was not error to permit the physician to

CRIMINAL LAW (Continued).

testify that the wounds must have been caused by some blunt instrument. (Id.)

63. **INSTRUCTIONS — CIRCUMSTANCES — REASONABLE DOUBT.** — Where proper instructions are given as to the law of reasonable doubt, as applied to circumstantial evidence, an instruction on that subject in the form approved in *People v. Anthony*, 59 Cal. 397, is not error, though the words "although the act may be surrounded in a degree by a doubt" might be properly omitted as meaningless. An instruction "that each and every fact and circumstance relied on by the prosecution to establish the guilt of the defendant must be proved by the evidence beyond a reasonable doubt, and if the jury are not entirely satisfied beyond all reasonable doubt that such fact and circumstance has been proven, it is your duty to find a verdict of not guilty," is favorable to the defendant, and when construed with other correct instructions given on that subject the defendant cannot complain. (Id.)
64. **REFUSAL OF INSTRUCTIONS.**—It was not error to refuse instructions requested by the defendant where all the matter contained in them is found in other instructions given by the court. (Id.)
65. **MURDER—MISCONDUCT OF DISTRICT ATTORNEY IN ARGUMENT.**—It was not misconduct for the district attorney in his argument to the jury to refer to a knife found in the possession of the deceased to rebut any inference that defendant's counsel may have drawn from the fact that it was not introduced in evidence; nor to urge that the evidence was conclusive of defendant's guilt. But it was unwarranted license to refer to the criminal history of the county, and to avow his belief in the efficacy of mob law, and to say that it would have been a good thing for the county if the defendant had been lynched; though such misconduct was not prejudicial or ground for reversal where the homicide was admitted, and the evidence makes it reasonably certain that the jury were not led by the misconduct of the district attorney to return a verdict which they otherwise would not have found. (*People v. McRoberts*, 25.)
66. **INSTRUCTIONS—CRIMINAL INTENT TO BE GATHERED FROM CIRCUMSTANCES—ILLUSTRATION NOT MISLEADING.**—An instruction correctly stating the law, that in order to constitute the crime of murder there must exist a union or joint operation of act and intent or criminal negligence, is not argumentative or misleading because it illustrates the impossibility of looking into or photographing or determining the workings of the human mind, and shows the necessity of gathering the intention with which the act was done from all the circumstances surrounding it. (Id.)
67. **DEFINITION OF MURDER—"MALICE."**—An instruction defining murder substantially in accordance with section 188 of the Penal Code, and stating that legal "malice" may exist where there is no spite or hatred or ill-will, and that an unlawful act done intentionally

CRIMINAL LAW (Continued).

and without just cause or excuse is an act in contemplation of the law done with "malice," as that word is understood in criminal judicature, is not subject to criticism. (Id.)

68. INSTRUCTION AS TO MANSLAUGHTER—REASONABLE DOUBT NOT REPEATED.—Where the court instructed the jury fully upon the question of reasonable doubt, it was not necessary that an instruction defining manslaughter and telling the jury that "the defendant may, if in your judgment the facts warrant it, be convicted of manslaughter" should expressly repeat the subject of reasonable doubt. (Id.)
69. INSTRUCTION CONSTRUED.—Where the court had defined the two degrees of murder, a following instruction, beginning "From these definitions the jury will see," does not leave the jury in doubt as to what previous definitions were referred to. (Id.)
70. JURISDICTION OF COURTS OF APPEAL—QUESTIONS OF LAW—SUPPORT OF VERDICT.—By the constitution, jurisdiction is conferred upon the district courts of appeal in criminal prosecutions by indictment or information in a court of record on questions of law alone. Where there is some evidence to sustain the verdict, there can be no question of law as to its sufficiency. (People v. Heart, 166.)
71. MURDER—SUPPORT OF CONVICTION IN SECOND DEGREE.—Upon a trial for murder where the defendant was convicted of murder in the second degree, *held*, in view of the evidence, that it cannot be said as matter of law that the killing was done "upon a sudden quarrel or heat of passion," or that there was no evidence of the "abandoned and malignant heart" constituting one of the elements of murder in the second degree. (Id.)
72. EVIDENCE—IMPEACHMENT OF DEFENDANT'S WIFE—STATEMENT OF KNOWLEDGE TO ATTORNEY—COMMUNICATION NOT PRIVILEGED.—Upon cross-examination of defendant's wife as a witness for defendant it was proper on cross-examination to lay the foundation for impeaching evidence by an attorney to whom she stated her knowledge of the transaction, while endeavoring, without success, to retain him as counsel for the defendant. Such statement is not a privileged communication under section 1881 of the Code of Civil Procedure. (Id.)
73. IMPANELMENT OF JURY—EXCUSE OF QUALIFIED JUROR BY COURT.—The court did not err in excusing a juror who had been examined from sitting on the panel in a criminal case, over the objection of the defendant thereto. (People v. Lee, 169.)
74. CHALLENGE TO PANEL—DENIAL WITHOUT PERMITTING PROOF—CURE OF ERROR.—It was error to deny a challenge of the defendant to the panel of jurors without permitting him to prove the facts upon which the challenge was made; but such error was cured by a subsequent offer to allow an opportunity to make the proof, of which the defendant declined to avail himself. (Id.)

CRIMINAL LAW (Continued).

75. **MODE OF IMPANELMENT.**—Where several jurors have been accepted and sworn, and the panel has been filled with talesmen, it was not error, when one of them has been excused for cause, to call another in his place without first examining the remaining talesmen, and to continue such course, where the right of the defendant to exercise his peremptory challenges was reserved until the panel was completed. (Id.)
76. **MURDER—EVIDENCE—DECLARATION OF DEFENDANT—RES GESTAE—REBUTTAL BY PROSECUTION.**—Upon a trial for murder, where the declaration of the defendant to the deceased that he was a peace officer, and requiring him to hold up his hands, was proved by the testimony of witnesses, and was part of the *res gestae*, the prosecution had the right to rebut the declaration by proof that the defendant was not a peace officer. (Id.)
77. **PRESUMPTION OF GOOD CHARACTER—AID OF PRESUMPTION OF INNOCENCE—REFUSAL OF INSTRUCTION—PROOF.**—A requested instruction that the defendant is presumed to be of good character for peace and quiet, and that such presumption is a fact in the case in aid of the presumption of innocence to be considered in determining whether the defendant is guilty, was properly refused. Any fact of good character greater than the presumption of innocence can only appear by evidence, which the prosecution, upon its admission, will be allowed to contradict; and any presumption against bad character is included in the presumption of innocence. (Id.)
78. **JUSTIFICATION OF HOMICIDE—REQUESTED INSTRUCTION INAPPLICABLE TO EVIDENCE.**—A requested instruction as to a theory of justification of the homicide which was inapplicable to the evidence was properly refused. (Id.)
79. **MURDER—INSTRUCTIONS AS TO MALICE.**—An instruction as to the definition of malice found in section 7 of the Penal Code is not appropriate in defining the crime of murder, and would better be omitted; but the giving of it is not prejudicial where at the request both of the people and of the defendant special instructions were given defining the malice mentioned in section 188 of that Code, and the jury were instructed that unless the evidence showed the elements of the crime charged there defined, they must acquit the defendant. (*People v. Waysman*, 246.)
80. **INSTRUCTIONS AS TO APPEARANCE OF DANGER—“REASONABLE MAN.”**—Where the jury were correctly instructed as to the law concerning appearances of danger to the defendant as a reasonable man, an instruction that “the ‘reasonable man’ of the law is each particular juror standing as near as the efforts of the law can place him in the precise condition the defendant stood when he committed the act,” though not lucid, is not misleading. (Id.)
81. **INSTRUCTIONS AS TO REASONABLE DOUBT—REPETITION—INSTRUCTION NOT MISLEADING.**—Where the court gave correct instructions

CRIMINAL LAW (Continued).

as to the law of reasonable doubt it was not necessary to repeat them; and where the court instructed the jury at defendant's request that if they entertain a reasonable doubt upon any single fact or element necessary to constitute the crime it is the duty of the jury to acquit, they could not be misled by an instruction for the people that if they entertain a reasonable doubt upon any material fact inconsistent with the defendant's guilt they should acquit. (Id.)

82. **MANSLAUGHTER—MALICE—MODIFICATION OF INSTRUCTION.**—Malice is no part of the definition of manslaughter, and it was proper to modify an instruction offered by the defendant on manslaughter by striking out a part including malice as an element thereof. (Id.)
83. **CREDIBILITY OF WITNESSES—TESTIMONY OF DEFENDANT—PROVINCE OF JURY.**—Where the defendant was a witness in his own behalf the province of the jury was not invaded by an instruction to the effect that they are the exclusive judges of the evidence and of the credibility of the witnesses, and of the weight to be given to their testimony, and that, in determining it, they may consider the character and appearance of the witnesses, the consistency and reasonableness of their statements, and the interest, if any, they may feel in the case. (Id.)
84. **REMARK BY JUDGE—ERROR WITHOUT PREJUDICE.**—In a criminal prosecution an improper statement made by the judge during the course of the trial in the presence and hearing of the jury, as to the effect of certain evidence, which could only have been favorable to the defendant's theory of the case, is without prejudice. (People v. Cowan, 411.)
85. **CROSS-EXAMINATION—FRATERNAL RELATION.**—It is permissible upon cross-examination to show the fact of relationship, fraternal or otherwise, existing between the witness and the party in whose interest he is called, as tending to affect his credibility. (Id.)
86. **MURDER AND MANSLAUGHTER—CONSPIRACY—INSTRUCTIONS.**—In a prosecution for murder, where the evidence showed that the defendant was one of several conspirators who were prepared to go to any extent to carry out their unlawful design, and had so agreed, and that the deceased was killed during the carrying out of such design, it is proper to charge the jury in effect that if such a conspiracy existed, and the same was established beyond a reasonable doubt, and that the deceased was killed by a shot fired in furtherance of the unlawful design, they should find the defendant guilty, notwithstanding they might have a reasonable doubt as to whether the defendant actually fired the fatal shot. (Id.)
87. **APPEAL—ARREST OF JUDGMENT—VERDICT.**—In a criminal prosecution an appeal does not lie from a motion in arrest of judgment nor from the verdict. (People v. Hill, 414.)
88. **MURDER—CONFLICTING EVIDENCE.**—In a prosecution for murder, where the evidence is conflicting as to whether the crime committed

CRIMINAL LAW (Continued).

was manslaughter or murder in the first degree, a verdict convicting the defendant of the latter offense will not be disturbed on appeal on the ground of the insufficiency of the evidence to sustain it. (Id.)

89. **ADMISSIONS — INSTRUCTIONS.**—In such a prosecution, where oral admissions of the defendant made to the officers soon after his arrest, had been placed in evidence through the testimony of the officers, it was not error to instruct the jury "that the evidence of certain witnesses as to oral admissions or statements of the defendant alleged to have been made to them should be received with great caution and viewed with scrutiny, and that in considering such testimony you should take into consideration the surrounding circumstances and surroundings of defendant and the probability or improbability of his having made such statements." Such instruction, even if erroneous, was favorable to the defendant. (Id.)
90. **WEIGHT OF DEFENDANT'S EVIDENCE.**—It was not error to instruct the jury in such prosecution as follows: "In considering the weight and effect to be given to the evidence of the defendant, while you may consider his manner, and the probability of his statements taken in connection with all the evidence in the case, and if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And in judging of the defendant who has testified before you you are in duty bound to presume that he has spoken the truth. Unless that presumption has been legally repelled, his evidence is entitled to full credit." (Id.)
91. **INSTRUCTIONS NEED NOT BE REPEATED.**—An instruction requested by the defendant as to the law of self-defense need not be given if it has already been given in substance. (Id.)
92. **TESTIMONY OF DEFENDANT.**—It was not error to refuse an instruction requested by the defendant as follows: "The object of the law in permitting parties charged with crime to testify in their own behalf is not merely to enable them to disclose facts wholly within their own knowledge, but to explain their own acts and motives with which they were performed and to explain, if need be, what they meant or intended to be understood as meaning by what they may have said or done at the time of the alleged criminal occurrence." (Id.)
93. **EVIDENCE.**—In a prosecution for the murder of a street-car conductor, in which it was shown that the killing was the culmination of a dispute between the defendant and the conductor as to whether the defendant had on a previous trip, by mistake, given the conductor a five-dollar gold-piece instead of a nickel, evidence is admissible that the conductor when taken to the hospital had not a five-dollar piece on his person. (Id.)

CRIMINAL LAW (Continued).

94. **CONFLICTING STATEMENTS OF DEFENDANT.**—In such a case evidence is admissible of conflicting statements of the defendant as to the time when he discovered the loss of the five dollars. (Id.)
95. **MURDER—APPEAL—SUFFICIENCY OF EVIDENCE—CONFLICT.**—Upon appeal from a conviction of murder, committed by a wife in the killing of her husband, where there is simply a conflict of evidence upon the question as to whether or not the defendant is guilty, this court cannot interfere with the verdict of the jury and the determination of the trial court thereon on motion for new trial. (People v. Bowers, 501.)
96. **EVIDENCE—SYMPTOMS OF ARSENICAL POISONING—CONDITION OF CLOTHING AND BED-LINEN.**—Where there is testimony that deceased was affected with such purging and vomiting as were symptoms of arsenical poisoning, evidence that the clothing and bed-linen used by the deceased during his illness shortly before his death were in a dirty and much soiled condition was properly admitted as corroborative of the testimony as to such symptoms, and also to support an inference that defendant as his wife was not as kind and considerate toward her husband as her conduct in the presence of witnesses would indicate. (Id.)
97. **EVIDENCE OF MOTIVE—INTIMACY OF DEFENDANT WITH ANOTHER MAN.**—It was proper to admit evidence to show that defendant and another man had intimate relations with each other and were levers, as tending to show a motive of the defendant for desiring the death of her husband. (Id.)
98. **CROSS-EXAMINATION OF MEDICAL EXPERT—QUESTION FRAMED FROM BOOK.**—Where on the cross-examination of a medical expert a question framed by the district attorney was objected to on the ground that he was reading from a medical book, whereupon he declared that he made the question his own, and, apart from the objection, it does not appear that the jury could have known that he was reading from any book, actual or reversible error does not appear, though the course adopted by the district attorney is not to be commended. (Id.)
99. **QUALIFICATION OF MEDICAL EXPERT—PROPER HYPOTHETICAL QUESTION.**—Where the record sufficiently shows the qualification of a medical expert, and a hypothetical question put to him embodied facts assumed which might fairly be inferred from the evidence, there was no assumption of the province of the jury in such question. (Id.)
100. **PROCURING OF POISON—PRESCRIPTION FORGED BY DEFENDANT—AGENCY OF SISTER.**—Evidence was admissible to show by a druggist that a sister of defendant procured an ounce of arsenic on a prescription signed with the name of a physician, where, regardless of the character of the agency of the sister, it was shown that the prescription was a forged one in defendant's handwriting and on paper torn from a book belonging to her and in her possession,

CRIMINAL LAW (Continued).

and that four grains of arsenic were found in her husband's stomach five days after the arsenic was procured, she having been in sole attendance upon him thereafter to the day on which he died. (Id.)

101. **MURDER—SUFFICIENCY OF EVIDENCE.**—Upon review of the evidence, held that it is sufficient to sustain a verdict of guilty of murder in the second degree, and to show that the killing was wholly unnecessary, in shooting an unarmed man in an intoxicated condition, and not in necessary self-defense. (*People v. Fitzgerald*, 507.)
102. **INADMISSIBLE EVIDENCE—DECLARATION OF DECEASED TO HIS WIFE.**—Where it appeared that prior to the homicide the wife of deceased was trying to get him away, evidence of what he said to her was properly excluded, there being no intimation in the question as to the nature of the statement sought to be elicited. (Id.)
103. **APPREHENSION OF BODILY INJURY—INAPPLICABLE INSTRUCTION—STRENGTH AND ACTIVITY OF PARTIES.**—Where there was no evidence as to the relative size, strength, and activity of the parties an instruction that the jury should take the same into consideration in determining whether the defendant had reason to apprehend bodily injury from the defendant was properly refused; and error cannot appear in refusing it where the record does not show that it was requested by the defendant. (Id.)
104. **NEWLY DISCOVERED EVIDENCE—INSUFFICIENT AFFIDAVITS.**—Affidavits of newly discovered evidence which are not shown in the record to have been offered or read on the motion for a new trial, and the contents of which would not justify a new trial, being designed merely to impeach a witness for the prosecution on a point which might have been fully shown at the trial, are insufficient to justify a new trial. (Id.)
105. **MURDER—EVIDENCE—DEGRADING QUESTIONS—HARMLESS CROSS-EXAMINATION.**—Where a witness for the defendant charged with murder had testified on his examination in chief that he was in the habit of sitting around the saloon where the homicide occurred a great deal of the time, and that he had been arrested on a charge of vagrancy as being an idle and dissolute person, the case will not be reversed because of harmless error in permitting the prosecution on cross-examination to ask questions in regard to the same matters that did not tend more strongly to discredit or degrade the witness than the facts he had already testified to on direct examination. (*People v. Richards*, 566.)
106. **TESTIMONY AT CORONER'S INQUEST—ANSWER TO QUESTION—CONTENTION WITHOUT MERIT.**—Where such witness was cross-examined on an answer given by him at the coroner's inquest, and upon objection that the whole answer should be read, the court informed the district attorney that he could use as much of it as he desired, a contention that error was committed is without merit where the

CRIMINAL LAW (Continued).

district attorney read the whole answer and asked questions thereupon. (Id.)

107. **COMPROMISE VERDICT FOR MANSLAUGHTER—INADMISSIBLE AFFIDAVITS OF JURORS.**—The affidavits of jurors are not admissible to impeach their verdict, except when there is a resort to chance, and it was not error to strike out affidavits of jurors that they had voted "Not guilty" and had agreed upon a verdict of manslaughter as matter of compromise with other jurors who had voted for different degrees of murder. (Id.)

108. **INSTRUCTION—DUTY OF JURORS.**—It was not error to instruct the jury that "it is the duty of every juror to reason with his fellow-jurors to the end that he may join in a lawful verdict." The instruction only states that which each juror is presumed to have known. The law requires that the jury retire for deliberation, which means careful consideration of the reasons for and against a choice or measure. (Id.)

109. **SELF-DEFENSE — INSTRUCTIONS — BURDEN OF PROOF—REASONABLE DOUBT.**—When the defendant admitted the killing and claimed self-defense, it was proper for the court to read as part of its charge section 1105 of the Penal Code, that "the commission of the homicide by the defendant being proved, the burden of proving circumstances in mitigation or that justify or excuse it devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justifiable or excusable," the court having also instructed the jury that the law does not require the defendant to establish his defense, even by a preponderance of evidence, but that if the evidence was such as to create in the minds of the jurors a reasonable doubt as to the guilt of the defendant, they should acquit him. (Id.)

110. **OBTAINING MONEY BY FRAUD—INSUFFICIENT VERDICT—JUDGMENT NOT SUSTAINED.**—Under an information charging the crime of knowingly and designedly by false and fraudulent representations defrauding a person named of over one hundred dollars in money a verdict finding the defendant "guilty of the crime of felony, to wit, obtaining money by false pretenses," does not respond to the issue, nor show any crime, and cannot sustain a judgment of imprisonment. (People v. Small, 320.)

111. **PROVINCE OF JURY—LEGAL DEFINITION OF CRIME.**—The words "the crime of felony" may be omitted from the verdict. It is not the province of the jury to determine the legal definition of the acts claimed to constitute a crime. (Id.)

112. **JEOPARDY—DISCHARGE OF DEFENDANT.**—The defendant having been placed in jeopardy by trial under a valid information, was entitled to be discharged after the receipt and record of an insufficient verdict. (Id.)

CRIMINAL LAW (Continued).

113. **ROBBERY—INSUFFICIENT INDICTMENT—OWNERSHIP NOT ALLEGED—CONVICTION OF GRAND LARCENY—ARREST OF JUDGMENT.**—An indictment charging the crime of robbery in taking money from the person of another forcibly against his consent, which does not allege the ownership of the money taken in some person other than the defendant, is insufficient, and will entitle the defendant convicted thereunder of grand larceny to an arrest of judgment. (*People v. Cleary*, 50.)
114. **PRESUMPTION OF OWNERSHIP FROM POSSESSION—INDICTMENT NOT AIDED.**—The presumption of ownership from possession, if uncontradicted, is accepted as matter of proof; but, as matter of pleading, an indictment cannot be aided in any case by presumption. (*Id.*)
115. **ROBBERY—ERROR IN ADMITTING DEPOSITION OF WITNESS ROBBED—WANT OF DILIGENCE—INSUFFICIENT SEARCH.**—Upon a trial for robbery, it was error to admit the deposition of the witness robbed taken at the preliminary examination on the alleged ground that the witness "cannot with due diligence be found within the state," where there is no competent evidence of such diligence, and the search for the witness was insufficient and perfunctory, without inquiry at last-known place of work outside of the county, though his absence from the county was known to the district attorney. (*People v. Ballard*, 232.)

DAMAGES. See Contract, 38-40, 44; Conversion, 3; Husband and Wife, 2, 5; Insurance, 5-7; Libel, 2-4; Negligence, 5, 6, 8, 12, 15, 26; Nuisance, 5; Sale, 6-11, 14; Streets, Roads, and Highways, 2; Water and Water-Rights, 2.

DEBTOR AND CREDITOR. See Execution; Garnishment.

DEPOSITION. See Contempt; Contract, 43.

DISTRICT COURTS OF APPEAL. See Appeals, 2; Criminal Law, 70.

DIVORCE.

1. **ADULTERY NOT CONDONED—SUPPORT OF FINDINGS.**—Where a divorce was granted to the wife on the ground of adultery of the husband, and the defense was condonation, on the ground that the physical condition of the defendant, long known to the wife before ceasing to cohabit with him, was such as would ordinarily be taken as proof of unfaithfulness, but the court found upon sufficient evidence that plaintiff at first believed his representation that his condition was not so occasioned, and that after becoming convinced of the contrary she never thereafter cohabited with him—the condonation was not sufficiently established to bar the plaintiff's right of action. (*Andros v. Andros*, 309.)

DIVORCE (Continued).

2. APPLICATION FOR ALIMONY—HEARING—AFFIDAVIT NOT COMPLYING WITH RULE—DISCRETION.—Upon the hearing of an application of a wife for alimony *pendente lite*, the court had discretion to permit her counsel to present his affidavit, though not served one day before the hearing, as required by a rule of the court. (*Yoree v. Yoree*, 152.)
3. REFUSAL OF CONTINUANCE TO HUSBAND—COUNTER AFFIDAVIT—FACTS AND CIRCUMSTANCES NOT EXPLAINED.—The husband was not deprived of any substantial right by refusal of a continuance to obtain a counter affidavit of his attorney that a transfer of certain property to him was *bona fide*, where there is no offer to explain other facts and circumstances calling for explanation, and the offer made was not sufficient to require the court to deny the alimony granted. (*Id.*)
4. DISCRETION TO ALLOW ALIMONY—BASIS OF ORDER—AMOUNT.—The court has discretion to require the husband to pay as alimony any money necessary to enable the wife to support herself or her children or to prosecute or defend the action; and in seeking information as the basis of its order is not bound by technical rules of evidence. The amount to be allowed is as much within the discretion of the court as its power to make the allowance; and its action will not be disturbed where no abuse of discretion is shown. (*Id.*)
5. DIVISION OF COMMUNITY PROPERTY—ADMISSIONS OF PLEADINGS—INCONSISTENT FINDINGS DISREGARDED.—Where the complaint of a husband, in an action for divorce on the ground of desertion, alleged that property described in the complaint was community property, and the answer expressly admitted that allegation, the fact admitted by the pleadings must be treated as found, and the finding of any probative facts inconsistent therewith must be disregarded; and the court, upon granting the decree, was authorized to divide the property, as community property, equally between the parties. (*Lambert v. Lambert*, 114.)

EASEMENT.

1. ACTION TO QUIET TITLE—RIGHT OF WAY—FINDING AGAINST EVIDENCE.—In an action to quiet title, where the evidence shows that plaintiff has only an easement of a right of way over the premises described, and that defendant is entitled to an easement therein of the same character, subject to plaintiff's enjoyment thereof, a finding that plaintiff owns the land and that defendant has no interest therein is against the evidence. (*Galletly v. Bockius*, 724.)
2. WAY MADE APPURTENANT TO DIFFERENT LANDS.—Where defendant was the original owner of the land, subject to plaintiff's right of way, and also owned lands bounded by it, he had the right to pass over the way as owner of the fee, subject only to plaintiff's

EASEMENT (Continued).

enjoyment thereof; and upon selling such land he had the right to reserve the way as an appurtenance to his contiguous tract bounded thereon, subject only to non-interference with plaintiff's enjoyment of the way. (Id.)

3. POWER OF OWNER TO CREATE EASEMENTS.—While the owner of the dominant tenement cannot increase the burden of the servient tenement against the will of the owner thereof, the owner of the latter is by virtue of his *jus disponendi* not limited in the number or character of the easements to which he may make his land subject. He may subject it to the easement of a right of way in favor of or as appurtenant to different tracts of land, whether owned by the same person or by different persons. (Id.)

EJECTMENT.

1. WRIT OF POSSESSION.—In an action of ejectment a writ of possession may be executed against a defendant against whom judgment has been rendered or his grantees *pendente lite*, although the judgment had not been entered against him prior to the issuance of the writ. (Baum v. Roper, 435.)
2. ENTRY PENDENTE LITE.—A person not a party to an action of ejectment who enters into possession of the demanded premises pending the action may be dispossessed under a writ issued on a judgment against the defendants unless he clearly and satisfactorily shows that he did not enter under or in collusion with either of them. (Id.)

See Mortgage, 2; Unlawful Detainer, 12-17.

ELECTION.

1. ELECTION CONTEST—STATEMENT BY ELECTOR—DATE BEFORE FILING—OBJECTION UPON APPEAL.—Upon the contest of an election by an elector where the statement, signed and dated the day before it was filed, shows that at the time of the election and canvass of the returns and at the date of the statement he was an elector, an objection not raised in the lower court cannot for the first time be urged upon appeal that the statement does not show that the contestant was an elector when the statement was filed. (Chatham v. Mansfield, 298.)
2. CONSTRUCTION OF CODE—FORMAL AND IMMATERIAL DEFECTS.—The literal rule stated in section 1117 of the Code of Civil Procedure, that a statement shall not be dismissed for want of form, should be held to apply not only to the statement of the grounds of contest therein referred to, but also to any other matter alleged in the statement. The same rule is to be applied to the statements and pleadings in election contests as would be applied to pleadings in other cases, and immaterial defects should be disregarded. (Id.)
3. CONSTRUCTIVE SERVICE OF CITATION AT RESIDENCE OF DEFENDANT—DUE PROCESS OF LAW—PRESUMPTION.—The provision in section

ELECTION (Continued).

1119 for a constructive service of the citation, in case the defendant cannot be found, by leaving a copy thereof at the house where he last resided, is not unconstitutional. Such constructive service constitutes due process of law, and the defendant must be presumed to know the law, and that after the return day of the election, if he absented himself, a citation might be left at his residence. (Id.)

4. INSECURE BALLOTS—ACCESS OF PUBLIC—ABSENCE OF EXPLANATORY PROOF—RETURNS NOT CONTROLLED.—Where the envelopes inclosing the ballots of certain precincts were received by the clerk in a broken condition, so that they might be interfered with, and were so kept by the clerk for a time that others might have access to them, and were afterwards sealed up by him, such ballots, in the absence of explanatory evidence to establish their genuineness with reasonable certainty, are *prima facie* impeached, and cannot be received to control the official returns. (Id.)
5. CANVASS BY SUPERVISORS—NATURE OF POWERS—REJECTION OF UNAUTHENTICATED RETURNS—CERTIFICATE.—The board of supervisors, in canvassing the returns of election, have no judicial powers, and cannot hear or determine evidence. They are not authorized to canvass any returns not duly authenticated, and have no duty to permit an authentication to be made of unauthenticated returns of a precinct, and may reject the same and issue a certificate of election based upon such rejection, which is *prima facie* evidence of a right to the office. (Gibson v. Twaddle, 126.)
6. CESSATION OF FUNCTIONS—REMEDY BY CONTEST—MANDAMUS NOT PERMISSIBLE.—Where the supervisors have issued the certificate of election and adjourned as a board of canvassers, their functions have ceased; and there being an adequate and exclusive remedy by contest of the election, *mandamus* will not lie after such adjournment to compel the board of supervisors to permit the election officers of the rejected precinct to authenticate the returns, and to count the rejected returns. (Id.)

EMINENT DOMAIN.

1. CONDEMNATION OF PROPERTY OF STATE—MATURITY OF ACTION.—The right to take the private property of the state in condemnation proceedings in the superior court has been granted by subdivision 2 of section 1240 of the Code of Civil Procedure; and a proceeding therefor begun one day before the taking effect of subdivision 7 of that section cannot be abated as premature. (California and Northern Railway v. State of California, 142.)
2. APPEARANCE OF ATTORNEY-GENERAL—JURISDICTION OF COURT.—Where the attorney-general appeared in the case for the state, as it was his duty to do under the provisions of section 472 of the Political Code, the state was just as much in court as though regularly summoned under section 1245 of the Code of Civil Procedure, and the jurisdiction of the court was complete. (Id.)

EMINENT DOMAIN (Continued).

3. PUBLIC ROAD—ACTION BY COUNTY—PLEADING—PROOF—MANNER OF CONSTRUCTION.—In an action by a county to condemn land for a public road it is not necessary either to plead or to prove the manner in which it is proposed to construct the road. (County of San Luis Obispo v. Simas, 175.)
4. QUALIFICATIONS OF PETITIONERS FOR ROAD—SUFFICIENCY OF COMPLAINT.—Where the complaint shows that ten of the petitioners for the road are freeholders who will be accommodated by the road, and that two of them are residents of the road district, who are taxable therein for road purposes, it properly states the qualifications of the petitioners within the terms and meaning of section 2681 of the Political Code. (Id.)
5. INTERMEDIATE ORDERS OF SUPERVISORS—REVIEW—COLLATERAL ATTACK—DISREGARD BY COURT.—None of the intermediate orders or proceedings of the supervisors between the filing of the petition and bond and the order to the district attorney are reviewable or subject to collateral attack in the action to condemn land for the road; but they must be disregarded by the court under section 2690 of the Political Code. (Id.)
6. JUDGMENT ON PLEADINGS—NONSUIT—WAIVER OF NOTICE—APPEARANCE.—Where the complaint was sufficient, in containing all of the matters required by section 1244 of the Code of Civil Procedure, and where all of its averments were proved and found, except notice of the time and place fixed by the board for hearing the report, which, however, is shown to have been waived by appearance of appellants thereat and their participation therein, their motions for judgment on the pleadings and for a nonsuit were properly denied. (Id.)
7. ORDER SETTING APART FUNDS BY TREASURER NOT ESSENTIAL.—An order of the board requiring the treasurer to set apart funds sufficient to satisfy the award is not material under section 2690 of the Political Code, and its obedience is not essential in determining jurisdiction, though the record sufficiently shows a compliance with such order. (Id.)
8. VALIDITY OF DECREE—ABSENCE OF HEARING—RECITAL IN ORDER FILED—PAYMENT INTO COURT—ERROR NOT PREJUDICIAL.—The final decree is not void, though erroneous, for want of an opportunity and notice of hearing; and such error is not prejudicial where the order filed with the clerk recites that it was made in court, and previous payment of the money into court, the only fact necessary to be established at the hearing, is conceded in the bill of exceptions. (Id.)
9. ORDER FOR POSSESSION—PENDENCY OF APPEAL—AMENDMENT OF CODE.—Since the amendment to section 1254 of the Code of Civil Procedure, an order for possession after payment of the money into court may be made pending an appeal from the decree of condemnation; and it was not error to refuse to permit proof of the appeal in making the order. (Id.)

EMINENT DOMAIN (Continued).

10. **CONDEMNATION OF SEPARATE PARCELS—ORDER REFUSING SEPARATE TRIALS—DISCRETION OF COURT.**—Under section 1244 of the Code of Civil Procedure, where separate parcels lying in the county are sought to be condemned by the county for a public road, the court has discretion to grant or refuse separate trials; and an order refusing separate trials will not be reviewed where no abuse of discretion appears. (Id.)
11. **TRIAL WITHOUT SEPARATION—PEREMPTORY CHALLENGES.**—The trial having been ordered to proceed without separation, the right of the defendants to peremptory challenges was limited to four, in which all defendants must join. (Id.)
12. **VIEW OF LAND BY JURY—CONSENT OF ONE JOINT OWNER—ACQUIESCENCE IN ABSENCE OF JUDGE.**—Where one of two joint owners of a tract representing the tract at the trial, in the absence of the other owner, consented to a view thereof by the jury, and made no objection to the statement of the judge that he would not attend the view, and did not formally request such attendance, there was no prejudicial error in the absence of the judge from the view. The acquiescence of such joint owner in the action of the court was in the exercise of a right or privilege he had to have such view, if no injury is shown to have resulted to the absent owner from the order. (Id.)
13. **INSANITY OF ABSENT OWNER—OFFER OF PROOF AFTER VERDICT—FINDINGS AND JUDGMENT.**—The rights of the parties are to be determined as they existed at the time of the submission of the cause to the jury; and after such submission and the verdict of the jury an offer to prove that the absent owner was insane cannot constitute an objection to the signing and filing of findings and judgment and the entry of judgment. (Id.)

EQUITY. See Pleading, 6, 7.

ESCROW. See Mortgage, 1; Unlawful Detainer, 14.

ESTATES OF DECEASED PERSONS.

1. **SPECIAL ADMINISTRATOR—MODE OF APPOINTMENT.**—A special administrator may be appointed either by the court or by the order of the judge at chambers. (*Raine v. Lawlor*, 483.)
2. **INADVERTENT APPOINTMENT—ABSENCE OF NOTICE UNDER RULE—JURISDICTION TO VACATE—ERROR—PROHIBITION.**—The court has jurisdiction to vacate an appointment, if inadvertently made on account of the absence of notice required by a rule of the court; and its jurisdiction to determine the matter includes the power to decide erroneously as well as correctly, and prohibition will not lie to prevent an erroneous order setting aside and revoking the appointment. (Id.)
3. **RIGHT OF APPOINTMENT NOT STATUTORY—REAPPLICATION UPON NOTICE.**—Even if no appeal lies from an order revoking the appoint-

ESTATES OF DECEASED PERSONS (Continued).

- ment of a special administratrix, she cannot be greatly injured, as there is no statutory right in any person to be appointed special administratrix, and she can again apply upon notice and be heard the same as any other applicant if the court should deem it necessary to appoint a special administrator. (Id.)
4. **PETITION FOR DISTRIBUTION—PROCEEDING TO SELL REALTY.**—While a proceeding for the sale of the real estate of a deceased testatrix is pending, in order to pay charges and funeral expenses, a petition by a sole heir for distribution of his share of the entire estate was properly denied. (Estate of Koppikus, 88.)
 5. **PARTIAL DISTRIBUTION.**—It was proper for the court to order a partial distribution of personal property under the provisions of the will. (Id.)
 6. **CARE OF BURIAL LOT—IMPROPER ENFORCEMENT OF UNCERTAIN PROVISION IN WILL.**—A part of the decree purporting to enforce an uncertain and indefinite provision in the will for an expenditure for care of a burial lot, which is not susceptible of enforcement, will be reversed. (Id.)
 7. **DISTRIBUTION OF LEGACY—COLLATERAL INHERITANCE TAX.**—Upon petition by a legatee for distribution of the amount of the legacy, in determining the amount of money in the hands of the executors, the court was only required to deduct the collateral inheritance tax upon the legacy, and was not required to take into consideration the whole amount of the collateral inheritance tax upon the several bequests. Such tax is not a unit; but is imposed upon the several amounts of the decedent's estate to which the successors thereto are respectively entitled; and it is to be assumed that other beneficiaries before receiving their shares had paid or deducted the amount of the tax upon their respective gifts. (Estate of Cheney, 30.)
 8. **PROPRIETY OF ORDER—DISPENSING WITH BOND.**—Where it appeared at the hearing that all allowed debts had been paid and all other legacies had been paid, and that the executors had in their hands a sum much in excess of the petitioner's legacy, and that an action was pending upon a rejected claim for a comparatively small sum, the court did not err in directing the payment of the legacy and dispensing with a bond. (Id.)
 9. **QUESTIONS OF FACT—EXTENT OF INDEBTEDNESS.**—The questions whether the estate is but little indebted, or the payment can be made without loss to the creditors, are questions of fact to be determined by the court upon a comparison of the value of the estate with the amount of the debts. (Id.)
 10. **ACTION UPON REJECTED CLAIM OF PETITIONER.**—The fact that a claim presented by the petitioner against the estate had been rejected, and that a suit thereon was pending, did not preclude the court from making the order for payment of her legacy any more than would a suit upon a rejected claim of any other person; and

ESTATES OF DECEASED PERSONS (Continued).

where it appears that the executors still have in their hands property belonging to the estate many times in value of the amount of the rejected claim, if adjudged valid, it cannot be said that the court decided erroneously. (Id.)

11. **AMOUNT REQUIRED TO ERECT TOMBSTONES.**—The court was not required to take into consideration the amount required for erecting tombstones authorized by the will where it appears that if the money on hand is insufficient, after other payments are made, resort may be had to sufficient real estate. The petitioner was not required to await such expenditure before being entitled to receive her legacy. (Id.)
12. **MORTGAGE—PRESENTATION OF CLAIMS—WAIVER—FORECLOSURE.**—It is not necessary to present a mortgage claim against the estate of a deceased person in order to foreclose the mortgage, where the complaint of the mortgagee waives all recourse against any other property of the estate. (*Hesser v. Taylor*, 619.)
13. **STATUTE OF LIMITATIONS—MORTGAGE DEBT NOT MATURE AT DEATH OF DECEDENT.**—Notwithstanding the mortgage debt was not mature at the death of the decedent, and more than four years elapsed from its maturity before foreclosure, yet it is saved from the bar of the statute by the concluding clause of section 353 of the Code of Civil Procedure, where the foreclosure suit was begun within one year after the issuing of letters testamentary or of administration. (Id.)
14. **ACTION AGAINST EXECUTORS—GRATUITOUS SERVICES.**—An action cannot be sustained against the executors of the will of a deceased person for services which are shown to have been gratuitously rendered to the deceased during her illness, by way of friendly and neighborly offices voluntarily given by plaintiff of her own motion, without request therefor by the deceased. (*Dallman v. Frank*, 541.)
15. **SUPPORT OF FINDINGS—INFERENCES FROM EVIDENCE.**—The findings of the court will be upheld if there is any evidence which by reasonable construction will support them, and the trial court is authorized to consider not only the testimony, but also all reasonable inferences of fact which can be reasonably drawn from the facts established by such testimony. *Held*, in view of all the evidence, that the court might reasonably infer from the friendly relations long existing between plaintiff and deceased that there was no employment of plaintiff, that her services were of a friendly and social nature, and that a finding that they were gratuitous and without expectation of reward cannot be said to be without support in the evidence. (Id.)
16. **PRESUMPTION OF CONTRACT OVERCOME.**—The presumption of a contract, which the law implies upon proof that one has rendered services to another, in the absence of any showing of the circumstances under which they were rendered, ceases to exist when it is

ESTATES OF DECEASED PERSONS (Continued).

- shown that they were merely such offices as one friend would perform for another in time of sickness or distress, either by way of physical aid or in the comfort of personal companionship. (Id.)
17. **IMMATERIAL FAILURE TO FIND VALUE OF SERVICES.**—After finding that the services rendered were gratuitous, the issue respecting the value of the services became immaterial, and the failure to make a finding thereupon was not error. (Id.)
18. **HARMLESS EVIDENCE—WILL OF DECEASED.**—Under such finding, the admission in evidence of the will of the deceased containing bequests to plaintiff is harmless. (Id.)
19. **CONTRACT BY EXECUTRIX TO DRILL WELL—ESTATE NOT LIABLE.**—In an action upon a contract by an executrix to drill a well on the property of the estate, it is error to order the judgment paid out of the assets of the estate. The rule is that executors and administrators cannot by virtue of their general powers as such make any contract which will bind the estate; but on contracts for necessary matters relating to the estate they are personally liable, and must see to it that they are reimbursed out of the assets. (*Benwick v. Garland*, 237.)
20. **COMPLAINT AND JUDGMENT AGAINST EXECUTRIX AS SUCH—AMENDMENT—WANT OF JURISDICTION.**—Where the complaint and judgment are against the executrix, as such, payable out of the assets of the estate, the court has acquired no jurisdiction over the executrix in her personal capacity; and the proceedings cannot now be amended and a personal judgment against her entered. (Id.)
21. **REPLEVIN BY ADMINISTRATRIX—EVIDENCE—DECLARATION OF DECEASED AGAINST INTEREST.**—In an action by an administratrix to recover tools in possession of the decedent as the property of his estate, where the defendant was the mother of the decedent and testified that the tools belonged to her, that her son was employed as foreman in her orchard and kept the tools at his house as matter of convenience, it was error to exclude evidence of the declarations of the deceased against his interest in support of the defendant's testimony. The declarations were admissible against the plaintiff, who, in her capacity as administratrix, is successor in interest of the deceased, within the meaning of section 1853 of the Code of Civil Procedure. (*Stoddard v. Newhall*, 111.)
22. **ACCOUNTS OF ADMINISTRATOR—NEGLECT IN SETTLEMENT OF ESTATE—PRESUMPTIONS—BURDEN OF PROOF.**—Upon the settlement of the third annual account of an administrator, where the administrator is sought by creditors to be charged with neglect for an unreasonable time to have the money on hand distributed or paid to creditors, and his letters are sought to be revoked, where it does not appear that the administrator has willfully or negligently caused the delay, and there was litigation, which went to the superior court, and no disobedience appears to the orders of the court, all presumptions are in favor of the regularity of the management of the estate

ESTATES OF DECEASED PERSONS (Continued).

by the administrator; and the burden is on the contesting creditors to prove the negligence alleged. (*Estate of Sylvar*, 35.)

- 23. DEPOSIT OF MONEY WITH INDIVIDUAL.**—The mere deposit of money by the administrator with an individual, who used it to some extent in his business, is not ground for removal or penalty where it does not appear that the administrator consented or was privy to such use and the administrator used no part of the money nor received anything for its use. (*Id.*)
- 24. CHARGE FOR INTEREST NOT INCLUDED IN GROUNDS OF CONTEST.**—Where a charge for interest against the administrator was not included in the grounds of contest against the account by the creditors, it cannot be considered. Such charge, either as a penalty for delay in settling the estate, or for deposit of the money with an individual, is not included in a specification that the administrator "has not accounted for all the estate which has come to his possession." (*Id.*)
- 25. DUTY OF COURT TO ORDER PAYMENT OF DEBTS.**—Where the account shows money on hand, it is the duty of the court to order the payment of the debts, as circumstances may require; and it was error for the court to deny such order to the extent that the funds on hand would justify. (*Id.*)
- 26. ORDER SETTLING FINAL ACCOUNT — APPEAL — RECORD — DOCUMENTS NOT EMBODIED IN BILL OF EXCEPTIONS — JURISDICTION.**—Upon appeal from an order settling the final accounts of an executor, where the record contains only the order settling the account, without a bill of exceptions, documents printed in the transcript consisting of a decree of partial distribution, a notice of appeal therefrom, and a *remittitur* reversing the decree, filed after the order settling the account, cannot be considered as showing that the court had no jurisdiction to settle the final account pending such appeal. (*Estate of Thayer*, 104.)
- 27. ACCOUNT NOT IN RECORD — PRIOR PARTIAL DISTRIBUTION — PRESUMPTION — JURISDICTION PENDING APPEAL.**—A decree settling the final account of an executor does not necessarily involve any question respecting the distribution of the estate; and where the account does not appear in the record, but only the order settling it, it must be presumed to contain no account of any payment made under a prior decree of partial distribution appealed from, but only accounts of receipts and payment of debts of the decedent and expenses of administration, of which the court would have jurisdiction regardless of such appeal. (*Id.*)
- 28. DECREE SETTLING ACCOUNT AND DISTRIBUTING ESTATE — REVIEW UPON APPEAL.**—A decree settling the final account of an executor and distributing the estate of the deceased testator will not be disturbed upon appeal unless the appellants show that their own interests in the estate have suffered by reason of the findings or decree of the court. They cannot object that the surviving wife,

ESTATES OF DECEASED PERSONS (Continued).

who is not before the court, has received less than she was entitled to, nor that they have received some part of the estate that should have gone to her. (Estate of Casner, 145.)

29. **TERMS OF WILL—INTEREST PAID TO SURVIVING WIFE.**—Where by the terms of the will the money of the estate was to be loaned out and the surviving wife was to receive the interest as fast as it accrued, the executor was fully authorized in paying the interest to her. (Id.)
30. **COMPOUND INTEREST—RIGHTS OF WIDOW NOT REPRESENTED—MISAPPROPRIATION OF ESTATE NOT SHOWN.**—The surviving wife being entitled to any compound interest received by the executor, only she or her legal representatives can be heard to complain as to the disposition thereof; and appellants cannot represent her interest, nor can they charge the executor with compound interest in the absence of any showing that he had misappropriated the funds of the estate. (Id.)
31. **EVIDENCE—ASSIGNMENT OF INTEREST—CLAIM OF WIDOW TO APPELLANTS—WANT OF CONSIDERATION—PRIOR DEED FOR SUPPORT—UNDUE INFLUENCE.**—An assignment by the widow of her claim for interest to the appellants was shown to be without consideration for support, where it appeared that there was a prior obligation of appellants to support her for life in consideration of a deed from her to them; and where the evidence also tended to show that the assignment was procured by undue influence, the action of the trial court in excluding it from evidence will not be interfered with. (Id.)
32. **CLAIM UPON NOTES—ACTION UPON REJECTED CLAIM—SUFFICIENCY OF COMPLAINT.**—Although, where a claim against the estate of a deceased person is rejected in whole or in part, a recovery in an action thereon is limited to the items of the claim rejected, yet, where action is upon the identical notes rejected, and additional facts stated in the complaint are merely explanatory of the demand, and no different contract is stated from that set forth in the claim, the cause of action is upon the claim; and the complaint is not rendered objectionable because of the mere segregation and lumping of certain classes of items not affecting their amount. (Ensoe v. Fletcher, 659.)
33. **DEATH OF PAYEE—DISTRIBUTION OF NOTES TO JOINT MAKER AS HEIR—CLAIM AGAINST CO-MAKER—CONTRIBUTION NOT INVOLVED.**—Where the notes sought to be enforced were never paid to the original payee, and after his death were distributed to one joint maker as heir of the payee, the only effect of such distribution was merely to extinguish the equitable share of the liability of such joint maker, and he is entitled by succession to the rights of the payee, by operation of law, to enforce one half of the liability upon the notes as a claim against the estate of the deceased co-maker. No claim for contribution is involved in such case. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

34. **SETTLEMENT OF ACCOUNT OF EXECUTORS—EXPENSE IN OBTAINING PROBATE—CONTEST OF WILL—REVIEW UPON APPEAL.**—Upon appeal from a decree settling the accounts of executors, the question whether the executors properly incurred items of disbursement set forth in their accounts in obtaining probate of the will in case of a contest thereof was to be determined by the court upon the evidence before it; and where the evidence is not set forth in the record upon appeal error is not to be presumed, and it cannot be said that the court erred in refusing to allow them as a charge against the estate. (*Estate of Scott*, 740.)
35. **CONSTRUCTION OF CODE—ALLOWANCE OF COSTS—DISCRETION.**—Section 1720 of the Code of Civil Procedure relates only to costs incurred in the appellate court, and does not import that this court has discretion to allow costs that the lower court had discretion to disallow. (*Id.*)
36. **REFUSAL OF DEVISEES AND LEGATEES TO CONTRIBUTE.**—The fact that some of the devisees and legatees refused to contribute to the expenses of the contest of the will furnishes no legal reason for this court's interfering with the order in the absence of any showing that those who refused to contribute would not have received more if the will had been denied probate. (*Id.*)
37. **IMPROPER USE OF FUNDS—CHARGE OF INTEREST.**—The court properly charged interest at the legal rate on funds drawn from bank by the executors and improperly disbursed in payment of items in the account which were disallowed by the court and which are not properly before this court for review. (*Id.*)
38. **SALES OF PERSONAL PROPERTY WITHOUT ORDER OF COURT—SURCHARGE OF VALUE AT TIME OF SALE.**—Where the executors sold cooperage at private sale at a price in excess of the amount appraised without any order of court or notice of sale or order confirming the sale, their accounts showing sales at the appraised value were properly surcharged with what was shown to be the excess in actual value at the time of the sales, without regard to the amount of excess received. (*Id.*)
39. **ATTORNEYS' FEES—DEDUCTION AND INCREASE IN ALLOWANCE—EMPLOYMENT OF SEVERAL ATTORNEYS BY SEVERAL EXECUTORS.**—Where the court allowed an aggregate sum to be drawn from court by three executors to pay attorneys' fees, without direction as to apportionment between attorneys employed by two of them and an attorney employed by the third, the court upon final settlement of the accounts had power to deduct an allowance from the amount paid to the former and to increase the allowance made to the executors for the latter. This only affects the settlement of the executors' accounts; and cannot conclude the attorneys, for the value of whose services the executor or administrator employing them is personally liable. (*Id.*)

ESTATES OF DECEASED PERSONS (Continued).

40. CONSTRUCTION OF CODE—POWERS OF MAJORITY.—Section 1355 of the Code of Civil Procedure, providing that “where there are more than two executors or administrators the act of a majority is valid,” does not import that the majority can deprive the remaining executor or administrator of the assistance and advice of counsel. (Id.)
41. SALE OF REAL ESTATE—EXPENSES OF ADMINISTRATION—MONUMENT PROVIDED FOR IN WILL.—An order was properly made to sell the real estate of a deceased testatrix to pay the expenses of administration and to carry out a provision in the will for the erection of a monument over the grave of the testatrix. (Estate of Koppikus, 84.)
42. BURIAL WITH HUSBAND’S CONSENT—REMOVAL AND CREMATION TO DEFEAT SALE—PROVISION FOR MONUMENT NOT AFFECTED.—Where, with the consent of the husband, his deceased wife had been buried as provided for in her will, and had remained in her grave for over a year, his subsequent removal and cremation of the body pending a petition for sale of real estate to raise funds for a monument, does not change the location of the grave so as to defeat the valid provision in the will for a monument over the grave. (Id.)
43. MONUMENT AS FUNERAL EXPENSES.—The provision for the erection of the monument was legitimate and proper, and even where there is no testamentary disposition or direction therefor, the courts will allow a reasonable sum out of the funds of the estate for the erection of a monument, putting the expenditure on the ground of funeral expenses. (Id.)
44. INDEFINITE PROVISION FOR CARE OF BURIAL LOT.—A provision for the care of the burial lot which is too indefinite and uncertain to be enforced cannot be properly included as a ground for an order of sale of real estate, and the order and judgment will be modified by striking out all reference thereto. (Id.)
45. SALE OF REAL ESTATE—OPPOSITION BY GRANTEE OF HEIR.—A grantee of an heir of real property is entitled to the share of the heir conveyed, and is a person interested in the estate, who is entitled under section 1540 of the Code of Civil Procedure to oppose an application for an order of sale thereof. (Estate of Steward, 57.)
46. EVIDENCE—DEED FROM HUSBAND—AVERMENTS IN PETITION—ADVERSE CLAIM NOT INVOLVED.—Where the petition of the administrator for the order of sale averred that the person named as grantor in the deed was the husband of the deceased, a deed from the husband to the opponent of the petition was sufficient proof of such opponent’s interest in the estate, and its introduction in evidence was proper, and did not involve the determination of an adverse claim to property of the estate. (Id.)
47. PETITION FOR SALE OF LANDS IN DIFFERENT COUNTIES—EXPENSES OF ADMINISTRATION—BEST INTEREST OF ESTATE—FINDING.—When the administrator petitioned for the sale of two distinct parcels

ESTATES OF DECEASED PERSONS (Continued).

of land in different counties to pay expenses of administration, and on the ground that it was for the best interest of the estate and those interested therein to sell both parcels, where it appeared that the sale of one parcel was amply sufficient to cover the expenses of administration, and the court upon opposition of a party interested denied the petition as to the other parcel, such denial is a finding that it was not for the best interest of the estate or those interested therein to sell the other parcel at probate sale. (Id.)

48. QUESTION OF FACT—REVIEW UPON APPEAL.—The question whether it was the best interest of the estate or those interested therein to order a sale of both parcels of real estate was a question of fact to be determined by the superior court upon the evidence before it in relation thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property or of the parties interested therein, it is not open to review upon appeal. (Id.)

49. APPEAL BY ADMINISTRATOR—PARTY NOT AGGRIEVED.—It is a sufficient answer to the appeal by the administrator, where none of the parties interested have objected to the terms of the order, that he is not aggrieved by an order refusing to sell one of the parcels, it being a matter of indifference to him whether those interested will be better subserved by a probate sale or by a distribution to them of such parcel. (Id.)

See Appeals, 5, 6, 11-13; Homestead; Wills.

ESTOPPEL. See Assignment, 6, 7; Contracts, 40, 50; Counties, 1; Municipal Corporations, 4; Negotiable Instruments, 6; Warehouseman, 2.

EVIDENCE. See Brokers, 2, 3; Contracts, 7-10, 14, 15, 18-21, 24, 26, 28, 39, 44, 55, 56; Criminal Law, 2-7, 9, 10, 16-18, 24, 25, 35-43, 46-49, 58-63, 72, 76, 77, 83, 85, 88-90, 92-107, 115; Deposition; Estates of Deceased Persons, 15, 18, 21, 31, 46; Forceful Entry and Detainer, 3; Guardian and Ward, 2, 5, 6; Homestead; Husband and Wife, 1, 3-5; Loan, 2, 3; Mortgage, 2, 3; Municipal Corporations, 7; Negligence, 4, 5, 11, 14, 16-18, 25, 27; Negotiable Instruments, 1, 3-6; New Trial, 1-3, 6, 8; Nuisance, 2; Sale, 3, 4, 15.

EXECUTION.

1. PROCEEDINGS SUPPLEMENTARY TO EXECUTION—ORDER DIRECTING GARNISHEE TO PAY JUDGMENT-CREDITORS—*RES ADJUDICATA*.—An order in proceedings supplementary to execution directing a garnishee to apply a sum due to the judgment-debtor to be paid to the judgment-creditors is in effect a judgment which, if not appealed from, is *res adjudicata* and conclusive in any other action between the

EXECUTION (Continued).

garnishee and the judgment-creditors. (*Societa Di Mutuo Socorso v. Mantel*, 107.)

2. **ACTION BY GARNISHEE TO DETERMINE CONFLICTING CLAIMS—DEFENSE.**—In an action by the garnishee to determine conflicting claims between an assignee of the claim and the judgment-creditors, the pleading and proof by the judgment-creditors of the supplementary proceedings as an estoppel against the garnishee constitutes a complete defense against the right of the garnishee to withhold the money from them or to pay it to any other party. (*Id.*)
3. **JUDGMENT FOR ASSIGNEE—OMISSION TO FIND UPON MATERIAL ISSUES—DECISION AGAINST LAW—REVERSAL OF NEW TRIAL ORDER.**—Where the answer also pleaded that the assignee had notice of the supplementary proceedings, and by failing to attend upon the same was estopped thereby, the failure to find upon the averments of the answer as to the supplementary proceedings in rendering judgment for the assignee and against the judgment-creditors was a decision against law, for which an order denying a new trial must be reversed. (*Id.*)
4. **ACTION UPON SHERIFF'S BOND—FALSE RETURN OF SALE—GRAVAMEN—NEGLECT OF DUTY—UNOFFICIAL STATEMENTS NOT INCLUDED IN RETURN.**—In an action upon a sheriff's bond for damages incurred by a false return of an order of sale, the gravamen of the action is the neglect of the sheriff to perform an official duty. Any statement or omission in his return not required by his official duty to be stated is no part of his return, and cannot constitute a neglect or breach of duty. (*Hooper v. McDade*, 733.)
5. **SALE UNDER FORECLOSURE—SATISFACTION OF JUDGMENT—EXTRA-OFFICIAL FALSE STATEMENT.**—Upon a sale under foreclosure it is no part of the duty of the sheriff to state in his report whether the proceeds are insufficient to make the payments directed or the amount of any deficiency; and an extra-official false statement that the order of sale and decree of foreclosure were fully satisfied, made in the report and indorsed upon the order, does not render him liable. (*Id.*)
6. **JUDGMENT-CREDITOR NOT CONCLUDED—AMOUNT OF DEFICIENCY.**—The judgment-creditor is not concluded by such report from having the deficiency computed and docketed against his judgment debtor after the sheriff's return of the writ. (*Id.*)
7. **DUTY OF CLERK—REQUEST OF PARTY INTERESTED.**—It is not the duty of the clerk to ascertain and docket the deficiency without any request so to do from the party interested therein. (*Id.*)
See Ejectment; Garnishment.

EXECUTORS AND ADMINISTRATORS. See *Estates of Deceased Persons; Wills.*

FINDINGS.

1. **ACTION UPON NOTE—EQUITABLE DEFENSE—SUFFICIENCY OF FINDINGS—OMISSION—PRESUMPTION.**—In an action upon a note where all other issues were sufficiently covered by the findings, the omission to find upon an equitable defense pleaded in the answer will not have the effect to invalidate the judgment for the plaintiff where it does not appear by the statement or bill of exceptions that evidence was submitted in relation to such issue; but it must be presumed in such case that there was no evidence to support it. (*Downing v. Donegan*, 710.)
2. **APPEAL FROM JUDGMENT—SUFFICIENCY OF FINDINGS—STATUTE OF LIMITATIONS.**—Upon an appeal from the judgment, where the findings show the date when the cause of action accrued, from which it appears that it is not barred by the statute of limitations, the failure of the court to make an express finding upon a plea of the statute of limitations does not render the findings insufficient to support the judgment for the plaintiff. (*Santos v. Silva*, 616.)
3. **OMISSION TO FIND UPON DISPUTED ITEM—REMISSION BY RESPONDENT—MODIFICATION OF JUDGMENT.**—Where the respondent confessed error in the omission to find upon a disputed item, as to which respondent has filed a written waiver and release of the judgment and interest thereon, the judgment will be modified accordingly, and affirmed as so modified. (*Id.*)

See Appeals, 8, 15; Brokers, 4; Contracts, 14, 15, 24, 26, 27; Divorce, 5; Estates of Deceased Persons, 15, 17; Forcible Entry and Detainer, 1, 2; Judgment, 1-3, 8; Money Had and Received; Mortgage, 1; Negligence, 8, 9; Nuisance, 1; Specific Performance, 4; Unlawful Detainer, 4, 10, 13.

FIXTURES. See Sale, 2.

FORCIBLE ENTRY AND DETAINER.

1. **BRIEF PEACEABLE POSSESSION—SUPPORT OF FINDING.**—In order to sustain an action for forcible entry and detainer, it is not essential that the prior peaceable possession of the plaintiff should have existed for any definite length of time. It is sufficient to support a finding of peaceable possession at the date of the forcible entry where there is testimony tending to show the actual peaceable possession of plaintiff for the greater portion of one day prior thereto. (*Highland Park Oil Company v. Western Minerals Company*, 340.)
2. **FORCIBLE EJECTION—SUPPORT OF FINDING—USE OF DEADLY WEAPONS.**—A finding that defendants with strong hand and with force and violence ejected plaintiff from the premises is supported by evidence that agents of the defendants demanded possession from plaintiff's agents with the exhibition of deadly weapons, supplemented with a statement that "jumpers have been known to lose a leg," which caused plaintiff's agents to leave the premises. (*Id.*)

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FORCIBLE ENTRY AND DETAINER (Continued).

3. **EVIDENCE—DEED TO PLAINTIFF—ERROR NOT PREJUDICIAL.**—While it is true that in proceedings under the Foreible Entry Act neither title, right of possession, nor good faith on the part of the plaintiff is essential to a maintenance of the action, yet the admission in evidence of a deed to the plaintiff is not prejudicial. (Id.)

FRAUD.

ACTION UPON NOTE—PURCHASE OF OIL STOCK—DEFENSE—RESCISSION FOR FRAUD.—In an action upon a note given on account of the purchase price of oil stock an answer setting forth that the defendant, having friendly relations with the plaintiff, was induced by his fraudulent representations, specifically set forth, to purchase the stock and to give the note sued upon, and setting forth a case of aggravated fraud, and prompt notice of rescission of the contract therefor upon discovery of the fraud, with demand for return of the note, discloses a complete defense to the action. (Grinnell v. Hill, 492.)

See Trust, 3; Unlawful Detainer, 8-10.

GARNISHMENT.

1. **INTERPLEADER—JUDGMENT CREDITOR—GARNISHMENT UNDER EXECUTION—WAIVER OF SUPPLEMENTARY PROCEEDINGS.**—Although ordinarily a creditor making a garnishment under execution must first obtain an order under proceedings supplementary to execution before suing the garnishee, yet where the corporation garnishee has filed a bill of interpleader between its judgment creditor and the garnishing creditor, whose judgment is against such judgment creditor, and they have interpleaded, such interpleader is a waiver of the necessity of supplementary proceedings by the garnishing creditor. (Water Supply Company v. Sarnow, 479.)
2. **CROSS-COMPLAINT OF GARNISHING CREDITOR.**—A cross-complaint of the garnishing creditor in such action is not demurrable on the ground that no order of court was obtained under supplementary proceedings allowing such creditor to sue on the garnishment. (Id.)
3. **SUFFICIENCY OF PLEADINGS—GENERAL DEMURRERS—WAIVER OF GROUNDS OF SPECIAL DEMURRER.**—Where only general demurrers were interposed to the bill of interpleader and to the cross-complaint, and each was sufficient as against such demurrer, any grounds of special demurrer arising from improper statement are waived. (Id.)
4. **EX PARTE ORDER FOR EXECUTION AFTER FIVE YEARS—LIFE OF JUDGMENT.**—The court had power to make an *ex parte* order for the issuance of the execution under which the garnishment was made after the lapse of five years from the entry of the judgment and before the expiration of five years and six months, which would bar an action upon the judgment. An order for the execution is

GARNISHMENT (Continued).

an order for its enforcement, and warrants the garnishment and its enforcement in the interpleader suit. (Id.)

See Execution.

GUARDIAN AND WARD.

1. **GUARDIANSHIP OF MINORS—WELFARE OF CHILDREN—QUESTION OF FACT—SUPPORT OF FINDINGS.**—In awarding the guardianship of orphan minors, the court is to be governed by what appears to be for the best interests of the children in respect to their mental and moral welfare. The question as to such welfare is one of fact, and where a finding of the court that it is for the best interests of the minors that the godmother of one of the children should have the control of them rather than their aunt, is sustained by the evidence, and the godmother was appointed as such guardian, the appointment will not be disturbed upon appeal from an order denying a new trial, regardless of whether a finding that the father requested such godmother to act as their guardian is or is not supported by the evidence. (Guardianship of Dellow, 529.)
2. **APPEAL FROM JUDGMENT AFTER SIXTY DAYS—REVIEW OF EVIDENCE.**—Upon appeal from the judgment, taken more than sixty days after its entry, the insufficiency of the evidence to support it cannot be reviewed, and the judgment must be affirmed. (Id.)
3. **GUARDIANSHIP—INCOMPETENT PERSON—SALE OF REALTY.**—The guardian of an incompetent person may be authorized to sell the real property of the incompetent, where it appears necessary and for the best interests of the estate, in order to pay expenses, debts, and cost of maintaining the incompetent ward. (Guardianship of Hayden, 75.)
4. **OPPOSITION TO SALE—CONTRACT TO DEVISE PROPERTY—INSUFFICIENT PROOF—COMPENSATION—IMPOSSIBILITY OF PERFORMANCE—UNEXPLAINED FAILURE.**—An opposition to the sale by one who seeks to enforce a contract with the incompetent to devise the property, for personal services, board and care for life, and cost of burial and monument, will not be sustained, nor the contract enforced in equity, where the proof is not clear, positive, nor convincing as to the existence and terms of such contract, or the services to be rendered, and where the services rendered may be fully compensated, and it is impossible to make a binding offer of full performance, and there is an unexplained failure to perform the alleged contract prior to the guardianship. (Id.)
5. **RULING UPON EVIDENCE—QUESTION TOO BROAD.**—It was not error to overrule a question which was too broad, so as to include any agreement in reference to all real property, and which was not confined to the agreement alleged. (Id.)
6. **CROSS-EXAMINATION—WHOLE OF CONVERSATION.**—It was proper on cross-examination to bring out the whole of a conversation partially testified to in the examination in chief. (Id.)

HABEAS CORPUS. See Criminal Law, 1, 14; Ordinance, 1.

HEALTH OFFICER. See Counties, 3, 4.

HOMESTEAD.

ESTATES OF DECEASED PERSONS—VALUE—EVIDENCE RECEIVED AFTER SUBMISSION OF CONTEST—APPRAISEMENT.—After a contest by a creditor of an insolvent estate of a deceased person to an application by his widow to have certain premises set aside as a homestead has been tried and submitted for decision, the issue involved being whether the value of the premises sought to be set aside was in excess of five thousand dollars, it is error for the court, without the knowledge or consent of such creditor, to appoint appraisers and receive the evidence contained in their appraisal as to the value of the premises; and an order setting aside the premises as a homestead, based upon the evidence of value contained in such appraisal, of which no notice was given the creditor as required by section 1478 of the Code of Civil Procedure, will be vacated. (Estate of McCarthy, 467.)

HUSBAND AND WIFE.

1. ACTION FOR ALIENATION OF AFFECTIONS OF HUSBAND—SUPPORT OF VERDICT.—In an action by a wife against another woman for alienation of the affections of her husband, where the testimony of the plaintiff and defendant, aside from a letter written by the latter, sustains the conclusion reached by the jury, it cannot be disturbed for insufficiency of the evidence. (Humphrey v. Pope, 374.)
2. INSTRUCTIONS—CONSTRUCTION—MALICIOUS INTENTION—BURDEN OF PROOF—DAMAGES.—The instructions in the action must be construed together in the light of the evidence before the jury; and when the instructions were not misleading nor prejudicial, and made it clear that there must have been a malicious intention to alienate the husband's affection from the wife, and to cause the separation, and properly defined the burden of proof, though omitting it in a single instance, and properly confined the damages recoverable to what should fairly seem the pecuniary loss of plaintiff, there is no reversible error therein. (Id.)
3. INADMISSIBLE EVIDENCE—DECLARATIONS OF HUSBAND—INCOMPETENCY UNDER CODE.—The declarations of the husband made to the wife as to his relations with the defendant, and of his desire for a divorce to marry her, were incompetent under section 1881 of the Code of Civil Procedure, and were properly excluded under a general objection of incompetency, in the absence of a showing of the consent of the husband. (Id.)
4. HEARSAY.—Such declarations were essentially incompetent as being mere hearsay evidence in the action for damages for alienation of his affections from the plaintiff by the defendant. (Id.)

HUSBAND AND WIFE (Continued).

5. **EVIDENCE—OTHER CAUSES OF SEPARATION—MITIGATION OF DAMAGES.**—Any evidence tending to show that the separation or alienation of affection resulted from other causes than those alleged is admissible as bearing upon the necessary averment that the loss of *consortium* was due to defendant's conduct, evidence tending to show the unhappy relations of the parties and want of affection between them prior to the defendant's interference and intrigues would be admissible in mitigation of damages. (Id.)

See Divorce.

INCOMPETENT PERSONS. See Contract, 41-43; Guardian and Ward, 3, 4.

INFANTS. See Guardian and Ward, 1, 2.

INJUNCTION.

1. **INJUNCTION AGAINST LABOR UNION—INJURY TO RESTAURANT BUSINESS—INTIMIDATION OF PATRONS—ABSENCE OF PHYSICAL FORCE—SUPPORT OF FINDINGS.**—In an action to restrain the members and agents of a labor union from interfering with the plaintiff's business, by intimidation of patrons, findings that they have "interfered with and intimidated" the patrons of plaintiff's restaurant, and have "prevented" them from entering and patronizing the same, and have patrolled the sidewalk for the purpose of "driving customers away" therefrom, do not imply the use of physical force, and they are supported by evidence, which, though conflicting, tends to show conduct, short of physical force, amounting to intimidation of the patrons of plaintiff and to an unwarrantable interference with the peaceable prosecution of his business to plaintiff's pecuniary injury. (*Jordahl v. Hayda*, 696.)
2. **RIGHTS OF ORGANIZED LABOR.**—Labor may organize for mutual benefit and self-protection, and organized labor has the right to effect its objects and purposes by all lawful means, lawfully exercised. (Id.)
3. **FREE SPEECH—PROPERTY RIGHTS—GUARANTIES OF CONSTITUTION—MAXIM—PROTECTION OF ALL CLASSES.**—The right of free speech is guaranteed to all citizens by the constitution; but it also guarantees them the right of acquiring, possessing, and protecting property, and obtaining safety and happiness; and it is a maxim of jurisprudence prescribed by law that "one must so use his rights as not to infringe upon the rights of another." These guaranties are equally important to and equally necessary for the protection of all classes of citizens. (Id.)
4. **ACTS ENJOINED—CERTAINTY OF JUDGMENT.**—The court was not required in its judgment to enumerate the particular acts of intimidation enjoined, and where its meaning is plain, and it leaves to

INJUNCTION (Continued).

the members of the labor union as intelligent, law-abiding citizens to determine what they may safely do without violating its provisions, it is sufficiently certain. (Id.)

INSTRUCTIONS. See Contracts, 20, 21, 53, 54; Criminal Law, 5, 6, 8-10, 19-23, 38, 39-43, 63, 64, 66-69, 77-83, 86, 89-92, 103, 108, 109; Libel, 5; Negligence, 17-21, 23; Slander, 6.

INSURANCE.

1. FIRE INSURANCE—POLICY ISSUED UPON KNOWN FACTS—WAIVER OF INCONSISTENT CONDITIONS.—The issuance of a policy of fire insurance upon known facts waives all conditions inconsistent therewith. (Loring v. Dutchess Insurance Company, 186.)
2. APPLICATION BY HOLDER OF EQUITABLE TITLE—LEGAL TITLE HELD AS SECURITY—CONDITION AS TO OWNERSHIP IN FEE.—An applicant for fire insurance in the sum of eight hundred dollars by one who had paid the consideration for the insured property, but who had taken the title in the name of another as security for a loan of five hundred dollars, who stated the facts about the title and the relation of the parties thereto in his application for the policy, and asked for insurance in the name of the creditor, the loss, if any, to be paid to the applicant as his interest may appear, is not precluded from recovery by an expressed condition in the policy that the applicant was the sole owner in fee of the property destroyed. (Id.)
3. CONSTRUCTION OF POLICY—JOINDER OF PLAINTIFFS.—The policy having issued with knowledge that the owner of the legal title had a smaller interest than the amount insured, with a proviso that the loss should be payable to the applicant, must be construed as intended to secure the interest of both of them, and the policy ran to both, and they were entitled to join as plaintiffs in an action upon the policy. (Id.)
4. CERTAINTY IN PLEADING—KNOWLEDGE OF FACTS.—Where the complaint avers that in the proofs of loss the interest of the creditor in the policy was disclosed, it shows with sufficient certainty that defendant was advised of the respective interests of the plaintiffs. Where it affirmatively appears that the facts are equally in possession of both parties, the rule is applicable that ambiguities and uncertainties should be viewed in the light of the situation of the parties as to their knowledge of the facts. (Id.)
5. NEGLIGENT DESTRUCTION OF PROPERTY BY FIRE—ASSIGNED CLAIM TO FIRE INSURANCE COMPANY—ACTION FOR DAMAGES—STATUTE OF LIMITATIONS.—An action by a fire insurance company upon the assigned claim of an insured person for loss of the insured property by fire, which was negligently kindled on defendant's land and negligently suffered to extend to the land of the insured, to recover the actual damages and costs suffered, is barred by sec-

INSURANCE (Continued).

- tion 339 of the Code of Civil Procedure if not brought within two years after the cause of action accrued. (*Phoenix Insurance Company v. Pacific Lumber Company*, 156.)
6. **STATUTORY PROVISIONS INAPPLICABLE — TREBLE DAMAGES.**—The three years' statute of limitations prescribed by section 338 is inapplicable to a cause of action for the actual damages presupposed in the treble damages provided for in section 3344 of the Political Code for negligently causing loss by fire. An action for actual damages for such loss would lie regardless of the provisions of the latter section. Treble damages cannot be recovered thereunder where neither the complaint nor the assignment nor the plaintiff's equitable right of subrogation will admit thereof. (*Id.*)
 7. **SUBROGATION — SPECULATION NOT ALLOWED.**—Subrogation is allowed by courts of equity solely to insure reimbursement and secure justice. The party subrogated will not be allowed to make a speculation out of this equitable right to be indemnified against unjust loss. (*Id.*)

INTERPLEADER. See Garnishment.

JUDGMENT.

1. **JUDGMENT—RENDITION—FINDINGS.**—The making and filing of findings of fact and conclusions of law constitute the rendition of judgment. (*Baum v. Roper*, 435.)
2. **SUFFICIENCY OF FINDINGS — FORMER JUDGMENT—PLEA IN BAR—COUNTERCLAIM—SUPPORT OF JUDGMENT.**—Where plaintiff offered no proof of the allegations of his complaint, it was the duty of the court to find against him; and it was not necessary to find upon the plea of a former judgment in bar of the action. Findings in favor of the same judgment pleaded as a counterclaim are sufficient to support a judgment rendered for the amount thereof against the plaintiff. (*Butler v. Delafield*, 367.)
3. **JUDGMENT UPON PARTNERSHIP CLAIM—SUPPORT OF FINDING.**—A former judgment rendered in an action in another state at suit of all the defendants jointly against the plaintiff, in which the cause of action sued upon here was adjudicated, and a judgment rendered for the defendants upon what is shown to be a partnership cause of action, is sufficient to support a finding that the judgment was in favor of the firm. (*Id.*)
4. **NON-PAYMENT OF JUDGMENT—PRESUMPTION—BURDEN OF PROOF—HARMLESS ERROR IN EVIDENCE.**—The non-payment of the judgment pleaded as a counterclaim is presumed, and the burden of proof of payment was upon the plaintiff. The deposition of a defendant containing inadmissible evidence of non-payment was harmless, where there was no evidence of payment. (*Id.*)
5. **STREET ASSESSMENT—FORECLOSURE OF LIEN—STIPULATION TO ABIDE ANOTHER SUIT—JUDGMENT ACCORDING TO PRAYER OF COMPLAINT—**

JUDGMENT (Continued).

WAIVER OF DEFECTS.—A stipulation in an action to foreclose the lien of a street assessment made after demurrer overruled that defendant need file no answer, and that the action shall abide the result of another like action by the same plaintiff against another defendant, and if that is decided for plaintiff judgment shall be rendered according to the prayer of the complaint, upon that contingency, judgment was properly rendered according to such prayer, notwithstanding the demurrer was improperly overruled, and the complaint was defective. The stipulation was a waiver of defects. (*Pacific Paving Company v. Vizelich*, 281.)

6. **JUDGMENT BY CONSENT—REVIEW UPON APPEAL.**—This court will not review a judgment rendered by consent, and a judgment under stipulation is a judgment by consent. (*Id.*)
7. **CONSTRUCTION OF JUDGMENT.**—The judgment will be construed to correspond with the prayer of the complaint, if it is susceptible of such construction. (*Id.*)
8. **DISMISSAL AS TO CO-DEFENDANT—FINDING—PRESUMPTION UPON APPEAL.**—Where the complaint alleged that the appellant was the sole owner of the property, and that the co-defendant claimed some interest therein, it must be presumed upon appeal in support of the judgment against the owner, and in view of the stipulation, that the action was properly dismissed as to the co-defendant, and that no finding was required as to his interest. (*Id.*)
9. **ACTION FOR CONVERSION—JUDGMENT FOR DAMAGES—LESSER LIABILITY OF ONE DEFENDANT—PAYMENT—CREDIT UPON JUDGMENT—SATISFACTION.**—In an action for damages for the wrongful conversion of plaintiff's property by sale thereof under execution, found to be of the value of one thousand dollars at the time of the taking, for which sum, with interest, judgment was rendered against three defendants, while as to a fourth defendant the judgment was limited to a less sum, in which the proceeds of sale had been applied to his use, after payment by him of such less sum, the other defendants are entitled to credit therefor upon the judgment against them, and upon payment of the residue of one thousand dollars, with interest and costs of suit, are entitled to a satisfaction of the judgment. (*March v. Barnet*, 583.)
10. **BENEFIT OF EXECUTION SALE.**—The plaintiff by accepting such less sum from one of the defendants has availed himself to that extent of the benefit of the execution sale, and is only entitled to the residue to the extent to which he has been injured thereby. (*Id.*)
See Appeal, 2, 4-9; Assignment, 8-10; Ejectment, 1; Execution, 1, 3, 5; Findings; Garnishment, 4; Injunction, 4; Liens, 3; Nuisance, 3, 10; Partnership, 1; Practice; Specific Performance, 5; Trust, 2, 3; Unlawful Detainer, 1, 2, 4, 13.

JURISDICTION. See Appeal, 2, 11; Certiorari; Contempt; Criminal Law, 15; Eminent Domain, 2; Estates of Deceased Persons, 2, 20, 26, 27; Justice's Court.

JURY AND JURORS.

1. **CHALLENGE TO PANEL—POWER OF SUPERIOR JUDGES—CONSTITUTIONALITY OF CODE PROVISION.**—A ground of challenge to the panel that section 204 of the Code of Civil Procedure in so far as it empowers superior judges to draw jurors in counties having over one hundred thousand inhabitants, and requiring the supervisors to draw them in other counties, is unconstitutional is not tenable. That section is constitutional and valid. (*People v. Richards*, 566.)
2. **CONSTITUTIONAL LAW.**—In cases of reasonable doubt the courts will not hold an act void because unconstitutional, and practice and acquiescence in the machinery provided for by the section in question as to the selection of juries, for so many years, sanctioned by the courts, furnish an almost irresistible reason for not overturning it. (*Id.*)
3. **UNTENABLE GROUNDS FOR CHALLENGE.**—The work delegated to the secretary of the judges, and the qualifications of jurors on the list, are not grounds for challenge to the panel. (*Id.*)
4. **DIRECTORY STATUTE—PANEL DRAWN FROM LIST OF PREVIOUS YEAR—ERROR NOT SHOWN.**—The provisions of the code as to the selection of jurors in January of each year are directory and are to receive a liberal construction, where the code provides that after a list of jurors has been made and returned they shall serve for the “ensuing year,” or until a new list shall be provided. No error appears in a panel drawn from the list of the previous year, in the absence of any showing that a new list for the current year had been certified and filed with the clerk. (*Id.*)
5. **REVIEW OF GROUNDS FOR ORDER—DENIAL OF CHALLENGE OF JURORS FOR CAUSE—DISQUALIFICATION.**—This court is not limited to the particular ground on which the court below granted a new trial, but may review the case and sustain the order on any ground assigned. Where one of the grounds assigned was error in denying plaintiffs’ challenge for cause interposed to jurors, and it appears that they were disqualified as not having been on the last assessment-roll, the error in denying the challenge is ground for supporting the order. (*Houghton v. Market-Street Ry. Co.*, 576.)
6. **“LAST ASSESSMENT-ROLL”—COMPLETED ROLL.**—The “last assessment-roll,” within the meaning of the statute, is the last one completed. The assessment-roll is not completed until certified by the assessor and delivered to the clerk of the board of supervisors. The fact that the jurors challenged had paid to the assessor taxes on personal property assessed for the current year, the assessment-roll including which was not completed at the time of the trial, is immaterial, where their names do not appear upon the last completed roll for the previous year. (*Id.*)

See Criminal Law, 73-75.

JUSTICE'S COURT.

1. NOTICE OF TRIAL—REQUEST FOR APPEARANCE—JURISDICTION—KNOWLEDGE OF JUDGMENT—FAILURE TO APPEAL—WRIT OF REVIEW—DISMISSAL.—A defendant served with summons from a justice's court, though residing elsewhere, who requested a co-defendant to appear for him, who did so, and was served with notice of trial, as his attorney, and informed him of the time and place of trial, had sufficient notice thereof to give the court jurisdiction to render a judgment against him; and when he had sufficient knowledge of the judgment and failed to appeal, his petition for a writ of review, after the time for appeal had expired, was properly dismissed. (*Grant v. Justice's Court of Second Township, County of Tnolunne*, 383.)
2. ACTION INVOLVING TITLE TO REALTY—INSUFFICIENT SHOWING.—A mere bald allegation in an unverified answer in a justice's court that "the determination of the action will necessarily involve title to real property," without the statement of any fact from which such conclusion would follow, is insufficient to authorize the justice to certify the case to the superior court, and the case was not legally before it for determination. (*McAlister v. Tindal*, 236.)
3. WANT OF JURISDICTION—DENIAL OF MOTION TO CHANGE VENUE.—The superior court, having no jurisdiction of the action, did not err in denying a motion to change the place of trial thereof. (*Id.*)
4. CERTIORARI—JUDGMENT UPON APPEAL FROM JUSTICE'S COURT—QUESTIONS OF LAW AND FACT—TRIAL BY JUSTICE WITHOUT LEGAL NOTICE.—*Certiorari* will not lie to review a judgment of the superior court rendered after trial therein, upon an appeal from a justice's court taken upon questions of law and fact, notwithstanding the trial was had in the superior court, without the presence of the appellant, and without the notice required by section 850 of the Code of Civil Procedure. (*Armantage v. Superior Court of Los Angeles County*, 130.)
5. JURISDICTION OF JUSTICE'S COURT NOT INVOLVED—ERROR IN SUPERIOR COURT NOT REVIEWABLE.—The jurisdiction of the justice's court is not involved in the petition for *certiorari* to review the judgment of the superior court, and conceding, without deciding, that it was error for the superior court to try the case upon appeal, its action in overruling an objection thereto was within its jurisdiction, which involves the power to decide wrong as well as right. (*Id.*)
6. ORIGINAL JURISDICTION OF SUPERIOR COURT.—Where an appeal is taken from a justice's court on questions of fact or questions of law and fact, the superior court has original jurisdiction to try the case without a statement if there was any trial of issues in the justice's court, with or without jurisdiction. (*Id.*)

See Contempt.

LABOR UNION. See Injunction.

LANDLORD AND TENANT. See Unlawful Detainer.

LARCENY. See Criminal Law, 33-44.

LEASE. See Assignment, 4-7; Unlawful Detainer.

LIBEL.

1. **LIBEL PER SE—ACCUSSION OF ARSON.**—A publication in a newspaper falsely intimating that the proprietor of a business establishment had set fire to his premises and that the fire officials had decided to arrest him if another fire occurred there is libelous *per se*. (Bohan v. The Record Publishing Company, 429.)
2. **DAMAGES—INJURY TO BUSINESS.**—The sole proprietor of a business conducted by a firm name, who is libeled under his firm name in such a manner as to affect him personally, is not limited to the recovery of such damages as resulted from the injury to his business. (Id.)
3. **PRESUMPTION OF DAMAGES.**—Damages to a person's reputation, fame, and credit are presumed to result from the publication of a libel *per se*. (Id.)
4. **PRESUMPTION OF MALICE.**—In an action to recover damages for the publication of a libel *per se* malice is presumed, and, if exemplary damages are not claimed, the fact that the publication was made without any ill-will towards the plaintiff, but in good faith and believing it to be true, cannot be considered in mitigation of damages. (Id.)
5. **INSTRUCTIONS—EVIDENCE.**—The refusal to give instructions not warranted by any evidence in the record is not error. (Id.)

LIENS.

1. **LIENS FOR UNPAID LABOR ON PERSONAL PROPERTY—BAILEMENT—EXCLUSIVE POSSESSION ESSENTIAL.**—A lien for unpaid labor bestowed on personal property exists only in favor of a bailee for hire who has an independent and exclusive possession of the property, personally or by agent, before and during the service required for the particular purpose of making, repairing, altering, improving, or protecting the article upon which he claims a lien. (Michaelson v. Fish, 116.)
2. **MASTER AND SERVANT—POSSESSION OF EMPLOYER—MANUFACTURE OF BRANDY—STORAGE WITH EMPLOYEE—ABSENCE OF LIEN FOR WAGES.**—Where the relation of master and servant exists, the possession of the servant, during the term of his employment, is the possession of his employer, and he can have no lien on a manufactured article which is in part the product of his labor. One employed as general manager in a distillery has no lien on the manufactured brandy in part the product of his labor, and the subsequent storage of the manufactured brandy by the employer, with

LIENS (Continued).

the consent of the employee, in the cellar of the latter, does not authorize him to retain possession thereof against the employer until his wages are paid. (Id.)

3. **FORECLOSURE OF LIENS ON VESSEL—STAY-BOND ON APPEAL—VOID BOND—ERRONEOUS JUDGMENT AGAINST SURETIES.**—Upon appeal from a judgment against the owners of a vessel foreclosing liens against the vessel and providing for a sale of the vessel, with engines, boilers, tackle, apparel, and furniture, under the provisions of section 813 et seq. of the Code of Civil Procedure, the ordinary bond on appeal is sufficient to stay execution, and a stay-bond given under section 942 of the Code of Civil Procedure in twice the amount found due is without consideration and void, and a judgment against the sureties thereupon must be reversed. (Olsen v. Birch, 99.)
4. **SHOWING OF ERROR—SERVICE OF BILL OF EXCEPTIONS.**—Where the erroneous judgment against the sureties on the void stay-bond appears on the face of the judgment-roll, exclusive of the bill of exceptions, it is immaterial whether the bill of exceptions was not served in time. (Id.)

See Assignment, 8-10; Banks, 5; Mechanic's Lien.

LOAN.

1. **ACTION FOR MONEY LOANED—MODE OF REPAYMENT—CONFLICTING EVIDENCE.**—In an action for money claimed to have been loaned to the defendant without conditions, where defendant claimed that it was advanced by plaintiff as agent of an insurance company to defray expenses of defendant as a soliciting agent of the same, and was not to be repaid except out of commissions earned, when sufficient, where the evidence was sharply conflicting, the verdict of the jury for the defendant cannot be disturbed in the absence of reversible error. (Perrin v. Carbone, 295.)
2. **CROSS-EXAMINATION OF PLAINTIFF—QUESTION NOT ANSWERED.**—The alleged error of the court in overruling an objection to a question asked of the plaintiff on cross-examination does not appear prejudicial where the record shows no answer to the question. (Id.)
3. **PROPER CROSS-EXAMINATION—CUSTOMARY ACTION OF PLAINTIFF.**—It was proper to ask of plaintiff on cross-examination how many agents he had employed during the last five years that had received loans from him whose commissions had not covered the amount of loans and whom he had not sued, and to show in answer thereto that there were at least a dozen of them, as tending to discredit plaintiff's theory that the advance to defendant was to be paid irrespective of commissions. (Id.)

LOBBYING CONTRACT. See Contract, 29-33.

MALICIOUS PROSECUTION.

1. **ARREST FOR PETIT LARCENY—FAULTY DESCRIPTION OF CRIME—MISTAKE IN NAME.**—Where the defendant maliciously prosecuted and

MALICIOUS PROSECUTION (Continued).

caused the arrest of the plaintiff for the alleged crime of petit larceny, without probable cause, and well knowing that no such crime had been committed, he cannot escape liability for damages for the malicious prosecution because of a faulty description in the complaint of the facts constituting the crime charged, nor because of a mistake in the name of the plaintiff whom he intended to prosecute for such crime. (*Cochran v. Bones*, 729.)

2. **ADVICE OF MAGISTRATE—CONCEALMENT OF FACTS.**—The defendant cannot claim protection under the advice of the magistrate that the crime charged had been committed, where he concealed facts from the magistrate which, if disclosed, would have prevented the issuance of the warrant. (*Id.*)

MANDAMUS.

WRIT OF MANDATE—NON-ENFORCEABILITY—TAX UNDER CHARTER—DISMISSAL OF APPEAL.—A writ of mandate which cannot be enforced will not issue; and an appeal from a judgment sustaining a demurrer to a petition for a writ of mandate to enforce the levy of a school tax which could not be enforced under the city charter when the appeal was taken, will not be reviewed upon its merits, but will be dismissed. (*Board of Education of the City of San Diego v. Common Council of the City of San Diego*, 311.)

See Counties, 1, 2; Election, 6; Municipal Corporations, 7; Office and Officers, 1; Policeman, 2; Schools, 4; Statute of Limitations, 3.

MASTER AND SERVANT. See Liens, 2; Mines and Mining, 1; Negligence, 21-25.

MEASURE OF DAMAGES. See Damages.

MECHANIC'S LIEN.

1. **ATTORNEY'S FEES ON FORECLOSURE—CONSTITUTIONAL LAW.**—Section 1195 of the Code of Civil Procedure, providing for the allowance of attorney's fees on the foreclosure of mechanics' liens, is valid, and not in conflict with any provision of the state or federal constitution; and the attorney's fees allowed thereunder are a lien upon the property foreclosed. (*Peckham v. Fox*, 307.)
2. **FORECLOSURE AGAINST OWNER—CONTRACTOR NOT SUMMONED—APPEAL—SERVICE OF NOTICE.**—Upon appeal by the owner from a judgment foreclosing mechanics' liens against him, the contractor, who was a mere nominal party defendant, and was not served with summons and did not appear, and against whom no judgment was rendered, need not be served with the notice of appeal. (*Nason v. John*, 538.)
3. **INSUFFICIENT COMPLAINT AGAINST OWNER.**—A complaint by a materialman against the owner which does not allege that at the time

MECHANIC'S LIEN (Continued).

of filing the notice of lien or bringing the action, anything was owing from the owner to the contractor, nor allege any premature payment by the owner to the contractor, nor any other facts giving the materialman a lien against the property of the owner, is insufficient to state a cause of action. (Id.)

4. **AMOUNT OF CONTRACT NOT ALLEGED—PRESUMPTION.**—Where it is not alleged that the contract was for a sum in excess of one thousand dollars, it must be presumed that the contract was not such a one as is required to be in writing and recorded, but was one in which the whole contract price may have properly been payable in advance, or in such installments as the owner and the contractor may have agreed upon. (Id.)
5. **WAIVER OF DEFECT IN COMPLAINT.**—A defect in the complaint in an action to foreclose a mechanic's lien, in not alleging that the materials contracted for were actually used in the building, is waived where the opposite counsel made a statement to the court limiting his objection to evidence solely to insufficiency in the form of the lien and practically allowing him to prove the fact of use without amendment in that regard; and the defendant cannot be permitted upon appeal to waive an objection to the complaint in that regard which might have been obviated by a timely amendment. (Madary v. Smartt, 498.)
6. **SUFFICIENCY OF LIEN.**—Where the complaint shows that the claim of lien stated all the matters required by section 1187 of the Code of Civil Procedure, and was filed in due time, it shows that a lien attached; and it is of little consequence whether the claimant styles it a claim of lien or a claim of benefit under the lien law. (Id.)
7. **LIEN UPON COUNTER AND PARTITIONS—ADDITIONS TO BUILDING—PERMANENT FIXTURES—SUPPORT OF FINDING.**—The lien was properly claimed upon a counter and partitions which were added to the building where they were shown to be such additions as amounted to a "repair and alteration" of the building, and the evidence was sufficient to support a finding that they were permanently attached to the building and became part thereof. (Id.)

MINES AND MINING.

1. **MINING—EXCAVATION BY SERVANT FOR MILL-SITE—EXTRACTION OF GOLD—TITLE OF SERVANT—RECOVERY OF VALUE.**—Where it appears that a servant employed by defendants solely to excavate land, appropriated as non-mineral, for a mill-site, and that in the course of his excavation for the mill-site he discovered gold, which was mined by him and reduced to his possession as his own, he is entitled thereto as the first taker on public lands, and may recover the value thereof from the defendants, who forcibly took possession thereof from him. (Burns v. Schoenfeld, 121.)
2. **FINDING OF TITLE SUPPORTED BY EVIDENCE—CONFLICT—CONCEALED INTENTION OF DEFENDANTS.**—A finding in favor of the plaintiff—

MINES AND MINING (Continued).

title to the gold mined is sufficiently supported where evidence of the intention of the defendants to avail themselves of any mineral found on the mill-site was concealed from the servants employed to excavate the land solely for a mill-site, and is in conflict with the physical facts and circumstances surrounding the work, and the testimony for defendants upon a former trial which tend to support the finding. (Id.)

MONEY HAD AND RECEIVED.

PLEADINGS—FINDINGS.—In an action to recover a balance of money alleged to have been delivered to the defendant for the use of the plaintiff, in which the answer admits the receipt of the money and sets up that by an agreement between the plaintiff and the defendant the latter paid to himself a portion of the balance sued for, findings as to the specific terms of such agreement are within the issues presented by the pleadings. (*Ellis v. Doherty*, 472.)

MORTGAGE.

1. FORECLOSURE OF MORTGAGE—MATURITY OF NOTE—DELIVERY AFTER DATE—TIME OF PAYMENT OF INSTALLMENTS—OPTION—FINDING—APPEAL FROM JUDGMENT.—Upon appeal on the judgment-roll alone from a judgment foreclosing a mortgage, where the court found that the note and mortgage were delivered in escrow, and finally delivered a month after their date, but also found that the time for payment of each installment "was according to the intention and agreement of both parties, to be computed according to the terms of the writing itself and after the date on the face of the note," and found a default accordingly, and an option, exercised as agreed, to declare the whole note due, when the action was commenced, it was competent for the parties so to agree, and it must be assumed that the evidence supported the findings. (*Bither v. Christensen*, 90.)
2. EJECTMENT—TITLE UNDER FORECLOSURE—PUBLICATION OF SUMMONS—EVIDENCE—JUDGMENT-ROLL—AFFIDAVIT AND ORDER NOT INCLUDED.—In an action of ejectment, where judgment was rendered for defendant under title acquired through foreclosure of a mortgage upon publication of summons against the owner of the mortgaged property in the year 1894, the admission in evidence of the judgment-roll as such by the court did not include the admission of the inadmissible affidavit and order for publication, though wrongfully attached to the judgment-roll by the clerk and offered by the defendant, and not objected to by the plaintiff; and no defect in the affidavit and order can be considered. (*Boyer v. Pacific Mutual Life Insurance Company of California*, 54.)
3. DUTY OF COURT AS TO EVIDENCE.—The duty of the court is not confined to passing upon such evidence as may be objected or excepted

MORTGAGE (Continued).

to, but extends to the preservation of the rights of litigants and a proper disposition of the matter in controversy. (Id.)

4. PUBLICATION AFTER RETURN OF SUMMONS—PRESUMPTION AS TO ALIAS SUMMONS.—Where the publication of summons was made after the original summons was returned, it will be presumed upon appeal where nothing appears on the face of the record to the contrary that an *alias* summons was issued. (Id.)
5. PAYMENT OF TAXES ASSESSED TO FORMER OWNER OF MORTGAGED PROPERTY.—Where one of the other defendants claiming under the insurance company defendant, which acquired title under foreclosure, paid taxes for a certain fiscal year which were assessed to the owner of the mortgaged property while he was in possession, such payment cannot inure to the benefit of such former owner. (Id.)

See Estates of Deceased Persons, 12, 13; Trust, 2, 3.

MUNICIPAL CORPORATIONS.

1. SPECIAL CHARTER REFERRING TO GENERAL LAWS—AMENDMENTS—FINES IN POLICE COURT UNDER STATE LAWS—PAYMENT TO COUNTY TREASURER.—The disposition of fines for misdemeanors imposed by a police judge under the state law in a municipal corporation chartered by special act prior to the constitution of 1879, the charter of which referred to the general law for its powers and duties, is not to be determined merely by the general law as it then stood, but is to be governed by existing amendments to such general law, providing that all such fines shall be paid to the county treasurer. (City of Marysville v. County of Yuba, 628.)
2. POWER OF LEGISLATURE—GENERAL LAWS AFFECTING MUNICIPAL CORPORATIONS.—The legislature may pass general laws affecting municipal corporations, without reference to whether such corporations were formed before or after the constitution of 1879. (Id.)
3. CONSTRUCTION OF CONSTITUTION—"MUNICIPAL AFFAIR."—The disposition of fines for misdemeanors punished by virtue of the state law, and not of any municipal ordinance, is not a "municipal affair" under a special charter which says nothing about fines, and leaves their disposition to be regulated by the Penal Code. (Id.)
4. SACRAMENTO—ILLEGAL CONTRACT—ESTOPPEL.—The city of Sacramento, the charter of which forbids it from entering into any kind of a contract for the expenditure of more than one hundred dollars unless authorized by a vote of the board of trustees, given in the manner therein provided, is not estopped to dispute its liability for materials of a greater value than one hundred dollars furnished to the city at the mere request of one of its trustees, although such materials were used by it for a municipal purpose, and it had previously paid for materials of a less value than one hundred dollars similarly ordered and used. (Fountain v. City of Sacramento, 461.)

MUNICIPAL CORPORATIONS (Continued).

5. **KNOWLEDGE OF CHARTER PROVISIONS.**—One who furnishes materials to a municipal corporation is charged with knowledge of its charter provisions in force at the time. (Id.)
6. **MUNICIPAL CHARTER—DUTY OF ASSESSOR—POWER OF CITY COUNCIL TO CONTRACT FOR SPECIAL DATA.**—Where a municipal charter makes the general law pertaining to revenue and taxation for state and county purposes applicable to revenue and taxation for city purposes, and the powers of the city council are as unlimited as the powers of the boards of supervisors, the council has power, in aid of its work of equalization in cases of undervaluation, to make a special contract for an abstract of the assessment-roll by the city, with comparisons with the county assessment-roll, and with maps and other data and information relevant to undervaluation not included in the information required from the city assessor, and to order the compensation therefor paid out of the city treasury. (*Maurer v. Weatherby*, 243.)
7. **MANDAMUS—EVIDENCE—WILLINGNESS OF ASSESSOR IMMATERIAL.**—In a proceeding for a writ of mandate against the city treasurer to compel the payment of a warrant for such compensation, evidence of what data the city assessor had the ability and inclination to furnish was immaterial, and was properly excluded. (Id.)

See Counties; Streets, Roads, and Highways.

MURDER AND MANSLAUGHTER. See Criminal Law, 59-109.

NEGLIGENCE.

1. **ACTION FOR NEGLIGENCE—OBSTRUCTION TO SURFACE WATER—BREAKAGE—INJURY TO PLAINTIFF'S LAND—SUPPORT OF FINDINGS.**—In an action for negligence in maintaining an embankment on defendant's land to impound water for irrigation, thus stopping surface water, which would naturally flow over plaintiff's land without injury, a breakage of which was caused by storm water, causing injury to plaintiff's land, where the court found for plaintiff and that good husbandry did not require that the embankment be maintained, and the evidence, though conflicting, was sufficient to support the findings, they will not be disturbed upon appeal. (*Cox v. Odell*, 682.)
2. **FLOW OF SURFACE WATER—LAWS OF NATURE.**—In the case of surface waters having no definite channel of escape, the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature should be left untrammelled in their disposition. (Id.)
3. **OBJECT OF EMBANKMENT—NEGLECT IN CONSTRUCTION—LIABILITY OF DEFENDANT.**—Whatever proper object the defendant may have had in the embankment, or right to construct it, where it was so negligently constructed as not to provide outlets for storm water, I Cal. App.—53.

NEGLIGENCE (Continued).

and such neglect was the proximate cause of the injury, the defendant is liable therefor. (Id.)

4. **OPINION EVIDENCE—BASIS SHOWN.**—Assuming an objection to the opinion evidence of the plaintiff, as to the effect of an outlet for water in a certain end of the embankment, was well taken, yet where the answer contained a statement of the physical conditions surrounding the premises, on which the opinion was based, it relieved itself from the force of the objection. (Id.)
5. **OBSTRUCTIONS CONTRIBUTING TO OVERFLOW—ISSUE AS TO DAMAGES—EVIDENCE WITHOUT PREJUDICE.**—Evidence as to obstructions contributing to the overflow, which were not within the issue as to damages, was without prejudice where no obstruction but the embankment itself was considered on the question of damages. (Id.)
6. **MEASURE OF DAMAGES—COSTS NECESSARY TO PUT LAND IN REPAIR.**—The cost and expense of restoring the land to its former condition, and the loss sustained from being deprived of its use, were the measure of damages; and it was erroneous to admit evidence as to the costs necessary to put the land in repair. The rule of difference in market value is not invariably applied. (Id.)
7. **MISTAKEN DESCRIPTION IN COMPLAINT AND FINDINGS—AVERMENT OF TRUE POSITION ADMITTED.**—Where there was a mistaken description of the land in the complaint as to legal subdivisions, as well as in the finding, which would indicate an incorrect position of the lands, yet where their true position is shown by an averment in the complaint, admitted by the answer, no finding is necessary in that regard, and the erroneous particular description may be ignored. (Id.)
8. **INJURY TO RAILWAY PASSENGER—CONSTRUCTION OF FINDING—DAMAGES—PRESUMPTION.**—In an action for negligence of a railway company causing an injury to plaintiff as a passenger, findings for the plaintiff are to receive such a construction as will support the judgment; and a finding that one thousand dollars will compensate plaintiff for the detriment caused will be construed to mean the amount necessary to compensate the plaintiff upon the presumption that the court, in the proper discharge of its duty, fixed no sum greater than was necessary and proper under the facts before it. The amount so found as compensation for the breach of defendant's duty will be deemed a fixation of the damages allowed for such breach by section 333 of the Civil Code. (*Griffin v. Pacific Electric Railway Company*, 678.)
9. **SUPPORT OF FINDING AS TO NEGLIGENCE—PREPARATION OF PASSENGER TO ALIGHT—SUDDEN JERK—PRESUMPTION.**—A passenger has a right as the car is approaching the place of destination to proceed to the door preliminary to alighting; and when, while preparing to alight, the car gave a sudden jerk, without notice, by reason of which he was precipitated to the ground and injured, the

NEGLIGENCE (Continued).

law presumes that defendant was not exercising the utmost care and diligence for the safe carriage of the passenger; and as the injury was produced by the carrier in operating the instrumentalities employed in its business, the presumption of negligence follows. (Id.)

10. **UTMOST CARE REQUIRED OF CARRIER—DUTY OF SUPERVISION—MEANS OF KNOWLEDGE.**—Whatever may be the rule elsewhere, a carrier of passengers in this state must bestow the utmost care, which involves such constant supervision and observation over and of passengers as will insure to the employees accurate information as to the condition and position of those under the carrier's charge. Where the means of knowledge in relation thereto exist, the same rule applies as would obtain where actual knowledge exists. (Id.)
11. **ACTION FOR DEATH—ORDER GRANTING NEW TRIAL—SUPPORT OF VERDICT — DISCRETION—CONFLICTING EVIDENCE.**—In an action by an administrator for the death of his intestate owing to the alleged negligence of the defendant, where the verdict was for the defendant, upon plaintiff's motion for a new trial for insufficiency of the evidence to support the verdict, it is the duty of the trial judge to exercise his judgment and discretion in reviewing the evidence, and, though it is conflicting, to grant a new trial if he does not believe that the verdict is the correct conclusion from all the evidence. This court will not interfere with the order granting a new trial where no abuse of discretion appears. (*Ruppel v. United Railroads of San Francisco*, 666.)
12. **DAMAGES RECOVERABLE.**—Where the evidence tends to show that the death resulted from the actionable negligence of the defendant, though the recovery is limited to the value of the pecuniary interest of those entitled to recover damages therefor, yet such value is not a precise sum, but such damages are allowable as, "under all the circumstances, may be just." It cannot be said as matter of law that a wife and minor children are entitled only to nominal damages for the wrongful death of the husband and father caused by defendants' negligence, notwithstanding the absence of proof of important circumstances to be considered by the jury in estimating the pecuniary damages to which the wife as administratrix of her deceased husband would be entitled. (Id.)
13. **COLLISION OF STREET-RAILWAY CAR WITH TRUCK—INJURY TO PASSENGER—PRESUMPTION.**—In an action against a street-railway company and another company owning a truck, for alleged negligence of each in causing a collision by which plaintiff, a passenger on the street-car, was injured, there is a presumption of negligence against the defendant railway company from the fact of the collision. (*Houghton v. Market-Street Railway Company*, 576.)
14. **ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE AS TO NEGLIGENCE.**—Where the defendants had a verdict, and a new trial was

NEGLIGENCE (Continued).

- granted for insufficiency of the evidence to sustain the verdict, the order will not be disturbed upon appeal where the evidence was conflicting as to whether or not the injury was due to the negligence of both defendants, and there was sufficient evidence to have sustained a verdict for plaintiff, if the jury had so found. (Id.)
15. COLLISION OF STREET-CARS—VERDICT NOT EXCESSIVE.—Where plaintiff was seriously injured as the result of a negligent collision between two street-cars upon defendant's road, and the evidence is such that a verdict for no more than two thousand dollars would not warrant any interference on the part of this court, with indulgence of any presumption that the jury in returning a verdict for that amount must have been influenced by anything other than the evidence, it cannot be disturbed as excessive. (Wood v. Los Angeles Traction Company, 474.)
16. OPINIONS OF MEDICAL EXPERTS—REQUESTS FOR CAUTIONARY INSTRUCTION.—It was not error to refuse to give a cautionary instruction requested by the defendant in reference to the opinion evidence of medical experts. (Id.)
17. FAILURE TO CALL CONSULTING PHYSICIANS—REQUESTED INSTRUCTION AS TO WEAKER EVIDENCE.—Where the plaintiff called the physician who regularly attended upon her, her failure to summon mere consulting physicians, who saw the patient but once or twice, was not such as to warrant a requested instruction that where a party offers weaker and less satisfactory evidence, where it appears that stronger and more satisfactory evidence was within his power, the evidence offered should be viewed with distrust; and such request was properly refused. (Id.)
18. INSTRUCTION AS TO "SURROUNDING CIRCUMSTANCES"—CONSTRUCTION.—An instruction to the effect that the jury were not only to consider all the evidence of the witnesses, but also "all of the surrounding circumstances, and draw all the inferences from such circumstances and from the testimony of witnesses as may be reasonably drawn," is to be construed as meaning only such circumstances as might be developed by the evidence, especially where the jury, in other instructions which should be construed together therewith, were expressly limited to a consideration of the evidence. (Id.)
19. INJURY TO PASSENGER WHILE ALIGHTING FROM STREET-CAR—ISSUE—INSTRUCTIONS—BURDEN OF PROOF.—In an action for injuries sustained by being thrown to the ground while alighting from a street-car, where the sole issue was as to whether the car started while the plaintiff was alighting, or whether he voluntarily alighted while the car was in motion, and instructions were fully given upon the subject of contributory negligence urged by the defendant, an instruction that the burden of proof is upon the plaintiff to show that the injury was caused by the act of the carrier in operating the instrumentalities employed in its business, and that if this be shown by a fair preponderance of all the evidence, then there is a

NEGLIGENCE (Continued).

presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part, was proper, and did not take the issue from the jury or mislead them as to the issue. (*French v. Pacific Electric Railway Company*, 01.)

20. **REFUSAL OF DEFENDANT'S REQUEST—MISLEADING INSTRUCTION.**—There was no error of which the defendant can complain in refusing a requested instruction, that in a case of this character the burden of proving negligence rests upon the plaintiff, and that he must prove the negligence by a preponderance of evidence, as it might naturally be understood by the jury as contradicting the instruction given upon the burden of proof, and would serve to mislead the jury. (*Id.*)
21. **MASTER AND SERVANT—INJURY OF SERVANT IN RAILROAD TUNNEL—INSTRUCTION—COMPLETED PART OF TUNNEL—APPLIANCE—SAFETY.**—Where the plaintiff was injured while working in a railroad tunnel from the falling of a rock from the side of a track laid therein, it was proper in effect to instruct the jury that where a permanent tunnel is being driven into a mountain to furnish a permanent bed for a railroad, the completed portion of the tunnel in which substantially all the work of excavation is performed, in order to render the tunnel of the size and capacity provided for in the plans and specifications, becomes an appliance and means furnished by the master by which the remaining work is to be prosecuted, and if so completed the employees of the defendants were obligated to use ordinary care to render such completed portion a safe place in which to work, and to keep it in a condition reasonably fit. (*McRae v. Erickson*, 326.)
22. **COMPLETION OF TEMPORARY GRADE OF TRACK.**—The excavation of the tunnel to the temporary grade of a track laid therein was a substantial completion of that portion of the tunnel. (*Id.*)
23. **CONTRIBUTORY NEGLIGENCE—IMMINENT DANGER—INSTRUCTION—CHOICE OF WRONG DIRECTION.**—Where there was no evidence to show that the plaintiff was brought into his dangerous position by any negligence of his own, it was proper to instruct the jury in effect that a person in imminent danger is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger, and that if plaintiff found himself in imminent danger and had not time to stop and consider and determine the better course to pursue, his choosing to run out toward the portal instead of back toward the bend was not negligence on his part, even though in so doing he may have run right under the falling rock instead of away from it. (*Id.*)
24. **NEGLIGENCE A QUESTION OF FACT.**—The question of negligence is commonly a question for the jury, and it is only in extreme cases that this court would be justified in disregarding the verdict of the jury. (*Id.*)

NEGLIGENCE (Continued).

25. EVIDENCE—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.—A physician in charge of defendant's hospital whose services were remunerated by assessments upon the wages of the men employed was in effect employed by the plaintiff, and answers made by the plaintiff to questions asked of him by the physician as to how the injury was sustained, for the purpose of determining his condition as preliminary to treatment, were privileged communications. (Id.)
26. FLOODING OF VINEYARD FROM DEFECTIVE DITCH—LIABILITY FOR DAMAGES.—The owner of a ditch used for irrigation, one of the head-gates of which was in poor condition and very defective, and which was operated in such a defective manner that the water flowing therein burst from it and flooded plaintiff's vineyard to his damage, is guilty of negligence, consisting of injury occasioned to another by want of ordinary care, and is liable to plaintiff, who was without contributory fault, for all resulting damages. (Bacon v. Kearney Vineyard Syndicate, 275.)
27. PROOF OF NEGLIGENCE—DECLARATION OF FOREMAN—HARMLESS ERROR.—Where there was abundant evidence, without substantial conflict, to prove the defendant's negligence, error in the admission of the declaration of defendant's foreman on that subject, without sufficient proof of his authority, will be deemed harmless. (Id.)

NEGOTIABLE INSTRUMENTS.

1. ACTION AGAINST PAYEE OF NOTES AS INDORSER—PLEADING—GENERAL ISSUE—EVIDENCE—INDORSEMENT TO MAKE—TITLE THROUGH MAKER.—In an action by an administrator against the payee of notes as an indorser thereof, where the case was tried upon the theory that a general denial in the answer was sufficient to raise an issue, except as to the execution of the notes, it was error to exclude evidence to show that the notes were transferred by the indorsement to the maker, and were to be surrendered up thereto, and were to be transferred by the maker as evidences of debt secured by mortgage, in consideration of advances to be made to the maker by plaintiff's intestate. (Bradley v. Bush, 516.)
2. EFFECT OF TRANSFERS—RIGHT OF ACTION AGAINST PAYEE NOT TRANSFERABLE BY MAKER.—The indorsement and surrender of the notes to the maker, with the understanding that they were to be transferred by the maker with the benefit of the mortgage security, was merely to keep the notes and security therefor alive for purposes of such transfer by the maker; but as the maker could not acquire any right of action upon the indorsement made thereto by the payee, no such right could be transferred by the maker, and the mere title to the notes was vested in the transferee of the maker. (Id.)
3. PROMISSORY NOTE—PAYMENT OF INTEREST IN ADVANCE—PRIMA FACIE EVIDENCE—GIFT OF CREDIT UPON PRINCIPAL—TIME NOT EXTENDED.—Although the general rule is that the payment of interest in advance is *prima facie* evidence of a binding contract to delay the time of payment of the principal of a promissory note, yet such

NEGOTIABLE INSTRUMENTS (Continued).

prima facie evidence may be overcome by proof that the facts were otherwise. Where there is evidence to sustain a finding that the payment of the interest in advance was in sole consideration of a contemporaneous gift of a credit of a larger sum upon the principal, and that there was no agreement extending the time of payment, an action upon the note before the expiration of the period of interest credited is not premature. (*Kellam v. Brode*, 315.)

4. EXCLUSION OF TESTIMONY IN SUPPORT OF ANSWER—ERROR CURED ON CROSS-EXAMINATION.—The erroneous exclusion of the testimony of a defendant in support of his answer was cured by the admission of the same testimony on his cross-examination. (*Id.*)
5. DEFENSE OF ASSUMPTION OF NOTE AS FIRM INDEBTEDNESS—ERROR IN EXCLUDING EVIDENCE.—Where the defense was that the note in suit was given for firm indebtedness, and that plaintiff, subsequent to its execution, assumed all of the indebtedness of the firm, including said note, and plaintiff admitted an agreement to pay a specified sum which included a number of individual notes of members of the firm, it was error to exclude evidence as to what notes or indebtedness were in fact paid under the assumption as being material in determining whether or not the note sued on was an obligation assumed by the plaintiff. (*Id.*)
6. FINDING AGAINST EVIDENCE—EXECUTION OF NOTE AFTER DATE—REPRESENTATION AS TO FIRM DEBT—ESTOPPEL.—Where the testimony shows without conflict that one of the defendants executed the note long after its date, under the inducement of a representation by plaintiff that it was for the indebtedness of the firm of which such defendant was to become a member, the plaintiff is estopped to deny as against such defendant that it was a firm obligation, to which the subsequent assumption of firm indebtedness by plaintiff was applicable, releasing such defendant therefrom, and a finding to the contrary is against the evidence. (*Id.*)
7. EXCESS IN AMOUNT FOUND DUE—COLLATERAL SECURITY—PRINCIPAL DEBT—MODIFICATION OF JUDGMENT.—Where it appears that the note in suit was given as collateral security, the amount recoverable thereupon cannot exceed the principal debt; and where the findings show an excess in the amount found due above that debt, that judgment must be modified accordingly. (*Downing v. Donegan*, 710.)

See Contracts, 29-33; Estates of Deceased Persons, 32, 33; Mortgage, 1; Surety.

NEW TRIAL.

1. APPEAL—ORDER GRANTING NEW TRIAL—PRESUMPTIONS—INSUFFICIENCY OF EVIDENCE—DISCRETION.—Upon appeal from an order granting a new trial in general terms, all presumptions are in favor of the order; and where one of the grounds of the motion was insufficiency of the evidence to justify the verdict, the motion on

NEW TRIAL (Continued).

that ground was addressed to the sound legal discretion of the court, and the order will not be reversed if no abuse of discretion appears. (*Baldwin v. Napa and Sonoma Wine Company*, 215.)

3. **CONFLICTING EVIDENCE.**—Where the evidence was sharply conflicting upon material issues, the court did not abuse its discretion in granting a new trial for insufficiency of the evidence. (*Id.*)
3. **SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—AGREED STATEMENT—ABSENCE OF OBJECTION.**—Where the specifications of insufficiency of the evidence were made in an agreed statement substantially embodying the testimony, and plainly pointed to the particular defect in the proof, and no objection was made thereto, though the court evidently passed upon the motion with the agreed statement before it, the specifications must be deemed sufficient. (*Michaelson v. Fish*, 116.)
4. **ORDER REFUSING TO SETTLE STATEMENT FOR DEFAULT IN PRESENTATION—MOTION FOR RELIEF—DISCRETION.**—A motion for relief, under section 473 of the Code of Civil Procedure, from an order refusing to settle a proposed statement on motion for new trial, and dismissing the proceedings for default in presentation of the statement and amendments within the time limited, is addressed to the sound discretion of the court, and where it cannot be said, upon the facts disclosed by the record, that the trial court abused its discretion in denying the motion for such relief, its order will be affirmed. (*Murphy v. Stelling*, 95.)
5. **NEGLECT OF MOVING PARTY.**—Where it appears that all the facts upon which the motion for relief was founded were known to the moving party three weeks before the hearing of the grounds for objection to the settlement of the statement, and he then put in no evidence to contradict the evidence of the opposite party as to his neglect, without any reason disclosed in the record to present such matters to the court at that hearing, it cannot be said that the court committed error in denying the motion. (*Id.*)
6. **APPEAL—ORDER GRANTING NEW TRIAL—CONFLICTING EVIDENCE.**—Where one of the grounds of the motion for a new trial was insufficiency of the evidence to justify the verdict, and the evidence is substantially conflicting, an order granting a new trial will not be set aside. (*Martin v. Markarian and Company*, 687.)
7. **REVIEW OF ORDER—GROUND EXPRESSED—APPELLATE COURT NOT LIMITED.**—In reviewing the order granting a new trial this court is not limited to the ground expressed by the trial judge; but the order will be sustained upon any tenable ground assigned. (*Id.*)
8. **ASSUMPSIT—VALUE OF SERVICES—CONFLICTING EVIDENCE—ORDER GRANTING NEW TRIAL.**—In an action of *assumpsit* where the evidence was substantially conflicting as to the value of the services rendered, the trial court was justified in granting a new trial for insufficiency of the evidence to sustain the verdict of the jury. (*Perry v. J. Noonan Loan Company*, 609.)

NEW TRIAL (Continued).

9. **PROPOSED STATEMENT—ADMISSION AND CONSENT—RESERVED OBJECTION—PRESENTATION WITHOUT NOTICE.**—Where the correctness of a proposed statement on motion for new trial was admitted, and a consent given that it might be settled, reserving only the right to object that the statement was not presented in time, without reserving any right to be present at the settlement, the right to propose amendments to the statement was waived, and the moving party was authorized to present the statement for settlement without notice to the other party. (Id.)
10. **RIGHTS OF JUDGE—SHOWING OF OBJECTIONS—RULING AND EXCEPTION TO BE INCORPORATED IN STATEMENT.**—The judge who settled the statement was not required to enter upon a personal investigation of the sufficiency of the objection which the opposite party had "reserved the right" to make, but was at liberty to assume that as he had failed to specify any fact or reason in support of the objection, and did not appear to make it, it was without foundation. Any matter in support of it, with a ruling and exception thereupon, should have been incorporated by the objecting party in the statement, and made part of the record. Any ruling upon the objection cannot be deemed excepted to, and any matter of objection outside of the statement cannot be considered. (Id.)
11. **REPLEVIN—ORDER GRANTING NEW TRIAL TO PLAINTIFF—COMMUNITY PROPERTY—ERRONEOUS INSTRUCTION—RATIFICATION OF WIFE'S ACTS.**—In an action of replevin an order granting a new trial to the plaintiff, after judgment for the defendants, will be sustained, where it appears that he claimed title to the property as community property, and an erroneous instruction was given as to his ratification of acts of his wife with defendants inconsistent with his claim of title, which omitted all question as to the knowledge of the plaintiff in relation to the transaction. (*Munroe v. Fette*, 333.)
12. **ISSUE AS TO A DEFENDANT WITHHOLDING POSSESSION—RECORD.**—Where the fact of a particular defendant withholding possession from its further continuance, but also providing, as an alternative, does not appear in the bill of exceptions, it cannot be said that the new trial was improperly granted as to such defendant. (Id.)
See Appeal, 8; Contracts, 34-37, 51; Criminal Law, 10, 24, 28, 104; Negligence, 11, 14.

NUISANCE.

1. **FLOODING OF LANDS BY SURFACE WATER—FINDINGS.**—In an action for damages, and to enjoin the continuance of an alleged nuisance, in flooding of plaintiff's lands by surface water, where the ultimate finding for plaintiff, sustained by the evidence, is that there were two or more channels or waterways and that all these were brought together into the channel complained of, the plaintiff is entitled

NUISANCE (Continued).

- to recover, regardless of whether other immaterial findings are or are not supported by the evidence. (*Humphreys v. Moulton*, 257.)
2. **EVIDENCE—IMMATERIAL RULINGS.**—Rulings upon evidence which could have no effect upon the result are not material. (*Id.*)
3. **DEFINITENESS OF JUDGMENT—ABATEMENT OF NUISANCE—ALTERNATIVE PROVISION.**—A judgment that the defendants abate the nuisance by removing the embankment or dike made by them, and filling up the ditch to its former level, and that they be enjoined from its further continuance, but also providing, as an alternative, that they may make other suitable provision for the care of storm waters so that no greater portion of storm waters will flow on to plaintiff's lands than before the defendants made the changes on their lands, is as definite as it is practicable to make it. (*Id.*)
4. **PUBLIC NUISANCE—STREET RAILWAY—ABATEMENT BY ABUTTER ON HIGHWAY—PLEADING—INSUFFICIENT COMPLAINT.**—The complaint of a private owner of property abutting on a highway does not state facts sufficient to constitute a cause of action for the abatement of a public nuisance consisting of a street railway whose tracks are not laid in the center of the street, as required by its franchise, but are laid a little more than four feet from the sidewalk adjacent to plaintiff's property, where it does not show an injury to the plaintiff different in kind from that which is suffered by every other owner of property on the same side of the street. (*Reynolds v. Presidio and Ferris Railroad Company*, 229.)
5. **DAMAGES CAUSED BY NUISANCE—DIMINUTION IN RENTAL VALUE—ACTION FOR COMPENSATION.**—An averment that the nuisance has damaged the "rental value" of the plaintiff's property in a specified sum, with a prayer for damages in that sum as incidental to the abatement thereof, cannot help the cause of action, nor constitute an independent cause of action for compensation for "taking or damaging private property" under the constitutional provision therefor, which must be the subject of a separate action. (*Id.*)
6. **ACTION TO ABATE NUISANCE—CAPACITY TO SUE—DEMURRER.**—In an action to abate a nuisance caused by obstruction of a public alley, upon which plaintiffs' property abuts, where there is nothing on the face of the complaint to indicate a want of capacity of the plaintiffs to sue, a demurrer upon that ground was properly overruled. (*Harniss v. Bulpitt*, 140.)
7. **PUBLIC NUISANCE—OBSTRUCTION OF PUBLIC ALLEY—CAUSE OF ACTION—SPECIAL INJURY TO PLAINTIFFS.**—Though the obstruction of a public alley is a public nuisance, yet where the complaint of the plaintiffs to abate it alleges that ingress and egress to and from the abutting property owned by plaintiff to and from the alley is prevented by the obstruction thereof by fences constructed thereon by the defendant, it states a cause of action for special injury to

NUISANCE (Continued).

- a private right incidental to the plaintiffs' property, different in kind from that sustained by the public at large. (Id.)
8. **MOTION FOR JUDGMENT UPON PLEADINGS.**—A motion of the defendant for judgment upon the pleadings was properly denied where the complaint states a cause of action. (Id.)
9. **AVERMENT OF PUBLIC ALLEY.**—The averment that the strip of ground obstructed was a public alley, and had been so used for twenty-five years as a means of ingress and egress to and from plaintiffs' property, is a sufficient statement of fact, without an averment of the manner by which it became a public alley. (Id.)
10. **ACTION TO ABATE NUISANCE—JUDGMENT—COSTS AND COUNSEL FEES—SUBSEQUENT ABATEMENT.—APPELLANT JURISDICTION.**—This court has appellate jurisdiction in an action to abate a nuisance; and where the judgment includes costs and counsel fees, and they have not been paid, the abatement of the nuisance in fact does not satisfy the judgment nor deprive this court of appellate jurisdiction over it to determine any question involved therein, including the propriety of the allowance of costs and counsel fees, though less than three hundred dollars in amount; and a motion to dismiss such appeal will be denied. (*White v. Gaffney*, 715.)
- See Streets, Roads, and Highways.

OFFICE AND OFFICERS.

1. **OFFICERS—NOMINATION—CONSENT OF SENATE—COMMISSION ESSENTIAL TO APPOINTMENT—MANDAMUS.**—Where the governor had nominated an officer, and the senate had advised and consented to his appointment, the appointment nevertheless does not take effect until a commission has been issued, and where no commission was issued by the governor making the nomination, *mandamus* will not lie to compel a succeeding governor to issue the commission. (*Harrington v. Pardee*, 278.)
2. **EXECUTIVE ACT—DISCRETIONARY POWER.**—In issuing a commission to an officer, the governor is performing an executive and not a ministerial act, and is acting under his discretionary powers, and may or may not issue the commission, though the senate has advised and consented to the appointment. (Id.)
- See Counties, 3, 4; Municipal Corporations; Policeman; Schools.

ORDINANCE.

1. **HABEAS CORPUS—VIOLATION OF COUNTY ORDINANCE—SUFFICIENCY OF COMPLAINT.**—A complaint charging a defendant with the violation of a county ordinance for selling liquors at retail without a license does not fail to state an offense merely because it does not set forth the ordinance in full, but refers to it by its title and the sections violated, and gives the date of its passage; and a writ of *habeas corpus* will not be granted on that ground. (*Ex parte Childs*, 39.)

ORDINANCE (Continued).

2. CONSTRUCTION OF CODE—ORDINANCE A PRIVATE STATUTE—PLEADING—JUDICIAL NOTICE.—A county or municipal ordinance is a private statute within the meaning of section 963 of the Penal Code, allowing a criminal pleading to refer to such statute by its title and the day of its passage, and requiring the court to take judicial notice thereof. (Id.)

PARTIES: See Pleading, 9; Sale, 5; Specific Performance, 2; Water and Water-Rights, 2.

PARTNERSHIP.

1. DISSOLUTION—IMPROPER JUDGMENT FOR BALANCE DUE—INSUFFICIENT ACCOUNTING.—A judgment in favor of one partner for a balance of accounts of money between the partners after dissolution of the partnership cannot be sustained where no account appears to have been taken of outstanding indebtedness which the firm might be owing to any other person, nor of any claims the firm may have against any person, nor of any firm assets other than those mentioned in the findings, and where there is no statement or finding that all of the assets have been exhausted. (Albery v Geis, 381.)
2. IMPORT OF ACCOUNTING—WINDING UP OF PARTNERSHIP.—An accounting of a dissolved partnership means that there is to be a complete winding up of the affairs of the partnership. (Id.)
See Judgment, 3; Pleading, 2.

PAYMENT. See Judgment, 4.

PLACE OF TRIAL. See Trust, 1.

PLEADING.

1. ACTION FOR BREACH OF CONTRACT—VERIFIED PLEADINGS—INCONSISTENT DEFENSES.—In an action for breach of contract, although the pleadings are verified, it is permissible for the defendant in his answer to deny the making of the contract alleged, and in separate defenses to admit its execution. (Butler v. Delafield, 367.)
2. COMPLAINT AGAINST FIRM—USE OF WORD "DEFENDANTS"—DESCRIPTION IN ANSWER NOT AMBIGUOUS.—Where the complaint is against copartners doing business under a firm name and alleges that defendants were such copartners, and thereafter refers to them as "defendants," an answer describing them as "defendants" is not ambiguous, but must be understood to refer to their alleged relation to each other as copartners. (Id.)
3. DEMURRER FOR AMBIGUITY AND UNCERTAINTY—REVIEW UPON APPEAL.—The improper overruling of a demurrer for ambiguity and uncertainty will not work a reversal of the judgment where it

PLEADING (Continued).

appears that the matters complained of by it have not affected any substantial right of the demurrant. An appealing plaintiff is not prejudiced by the overruling of such a demurrer to uncertain denials in the answer, where he could not be misled by the denials and offered no evidence to support his complaint or to controvert evidence in support of separate defenses in the answer as to which there was no ambiguity. (*Id.*)

4. **ACTION UPON NOTE—ERROR IN COPY—AMENDMENT—CAUSE OF ACTION NOT CHANGED—STATUTE OF LIMITATIONS.**—In an action upon a note, in which the complaint alleged a promise to pay the plaintiff, and set forth stock certificates attached thereto, which are alleged to have been pledged to secure the payment of "said note delivered to the plaintiff," but by a clerical error inserted the name of another payee in the copy of the note, an amendment to the complaint made four years after the maturity of the note, which properly describes the note as payable to plaintiff and alleges that it is the same note alleged in the original complaint, corrects the cause of action therein defectively stated, and does not show a new cause of action barred by the statute of limitations. (*Ball v. Lowe*, 228.)
5. **AMENDMENT OF COMPLAINT TO CONFORM TO PROOF—SERVICE AND FURTHER HEARING NOT REQUIRED.**—Where, at the trial of an action, evidence is introduced which would support an amendment to the complaint germane to the cause of action, the court has power, after submission of the cause, to order immediate amendment to be made, so as to conform to the proof, without the necessity of service and further hearing. (*Maionchi v. Nicholini*, 690.)
6. **QUIETING TITLE—STATEMENT OF FACTS—EQUITABLE RELIEF.**—Although an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments commonly made in such an action, yet where the facts upon which the plaintiff's claim is based are alleged, and there is a prayer for general relief, the court can grant any proper relief within the limitations of section 580 of the Code of Civil Procedure. (*De Leonis v. Hammel*, 390.)
7. **APPROPRIATE EQUITABLE REMEDIES.**—Appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing and enforcing trusts, or determining the priorities of opposing equities may be had between proper parties, under our system, whenever they are required upon equitable considerations, and are justified by the pleadings and proof. (*Id.*)
8. **SUFFICIENT COMPLAINT—DEMURRER IMPROPERLY SUSTAINED.**—Where the facts alleged in the complaint show that plaintiff's title is paramount to any claims of lien by the defendants, and that she is entitled to have her rights determined, and there is no defect

PLEADING (Continued).

of necessary parties or uncertainty as to the facts, a demurrer thereto was improperly sustained. (Id.)

9. **PARTIES.**—The failure to join proper parties, not appearing to be necessary parties, is not ground of demurrer for defect of parties. But if it should appear at any time during the progress of the cause that the presence of other parties than those named in the complaint is necessary to a complete determination of the controversy, they can be brought in. (Id.)
10. **UNCERTAIN LEGAL CONCLUSION FROM FACTS.**—Where the facts are alleged with certainty, uncertainty as to legal conclusions therefrom is not ground of demurrer. (Id.)
11. **CONSTRUCTIVE TRUST—DEED AS MORTGAGE—NOTICE OF EQUITIES—STATUTE OF LIMITATIONS—RELIEF FOR FRAUD—INAPPLICABLE PROVISION.**—Whether the complaint shows a constructive trust in the legal title procured by fraud, or shows a deed intended as a mortgage, with notice of plaintiff's equities to all of the defendants, the three years' limitation to an action for relief on the ground of fraud prescribed by subdivision 4 of section 338 of the Code of Civil Procedure is inapplicable. (Id.)
12. **MOTION FOR NONSUIT—GROUND NOT SPECIFIED.**—A motion for a nonsuit must be held to have been erroneously granted where the record fails to show any specified ground for the motion. (Id.)
 See Brokers, 1; Contracts, 6, 12, 16, 22, 23, 39; Corporations, 2; Divorce, 5; Eminent Domain, 3, 4, 6; Estates of Deceased Persons, 32; Fraud; Garnishment, 3; Mechanic's Lien, 3-3; Money Had and Received; Negligence, 7; Negotiable Instruments, 1; Nuisance, 4-9; Office and Officers; Slander, 1-3; Specific Performance, 1; Statute of Limitations, 1; Surety, 2.

PLEDGE. See Assignment, 2.

POLICE COURT. See Bail-Bond.

POLICEMAN.

1. **DURATION OF OFFICE—REMOVAL BY APPOINTING POWER.**—Police-men appointed by the board of police commissioners, having no term of office fixed by law, hold during the pleasure of the appointing power under section 16 of article XX of the constitution; and the board of police commissioners may remove a policeman without charges, notice, or trial. (Farrell v. Board of Police Commissioners of the City and County of San Francisco, 5.)
2. **REINSTATEMENT—MANDAMUS—STATUTE OF LIMITATIONS.**—Mandamus will not lie to compel the reinstatement of a removed policeman; and an application therefor nine years after the removal is barred by the statute of limitations. (Id.)
 See Statute of Limitations, 3-5.

PRACTICE.

1. **JUDGMENT BY DEFAULT—VACATION—EXCUSABLE NEGLECT—DISCRETION.**—An order vacating a judgment suffered by default on the ground of the excusable neglect of the defendant is addressed to the discretion of the court, and will not be disturbed where no abuse of discretion appears. The discretion of the court is best exercised when it tends to bring about a judgment on the merits of the controversy between the parties. (*Pelegrinelli v. McCloud River Lumber Company*, 593.)
2. **PLAINTIFFS NOT INJURED.**—Where a proper affidavit of merits was shown, and an answer tendered with an offer of a speedy trial on the merits, and the plaintiffs made no claim that they would suffer any loss or injury by reason of the setting aside of the default, or that they would be deprived of any right by an early trial of the cause, and the order was made upon terms, the terms must be deemed an ample compensation to them for inconvenience and delay in being put to a second hearing of the case. (*Id.*)
3. **AFFIDAVIT UPON INFORMATION AND BELIEF.**—Though the code authorizes allegations of a pleader to be made upon information and belief, an affidavit which is to be used as evidence must be positive and direct, and facts purporting to be stated therein upon information and belief are not to be considered. (*Id.*)
 See Appeal; Costs; Execution; Findings; Instructions; Judgment; New Trial; Pleading; Statute of Limitations.

PROBATE LAW. See Estates of Deceased Persons.

PROHIBITION. See Contempt; Estates of Deceased Persons, 2.

PROMISSORY NOTE. See Negotiable Instruments.

QUIETING TITLE. See Easement, 1; Pleading, 6-12.

RAILROAD.

1. **EJECTION OF PASSENGERS FROM FREIGHT-TRAIN—EVIDENCE—CONDITION OF PASSENGER—PAYMENT OF FARE—DECLARATIONS OF CONDUCTOR.**—In an action of damages for the ejection of a passenger from a freight-train, where the conductor and numerous witnesses testified that he was drunk, and the plaintiff denied it and attributed resulting injury to his sickness, and it appears that . . . then paid his fare to the brakeman, it was prejudicial error, without legal foundation for impeachment, to admit evidence of the mere declarations of the conductor made on the subsequent day that the plaintiff was not drunk, that he had paid his fare, and that he had been put off at a prior station because he did not intend to stop at his destination. (*Wieland v. Southern Pacific Company*, 343.)
2. **CUSTOM AS TO PASSENGERS ON FREIGHT-TRAINS—RIGHTS OF PASSENGER.**—A passenger having knowledge of the custom to carry

RAILROAD (Continued).

passengers on freight-trains between certain points has a right to assume its continuance unless notified in the usual manner, and is not bound to make special inquiry or to obtain a special permit, and the railroad company, having knowledge of such custom, would be liable to the passenger for a violation of his rights, though the custom was in violation of its rules. (Id.)

3. **SUSPENSION OF RIGHT—NOTICE TO PASSENGERS—CUSTOM AS TO STOPPAGE OF FREIGHT-TRAIN.**—The mere fact that passengers were carried on the freight-train did not confer upon plaintiff an absolute right of transportation. The company could suspend or determine the permissive use; and notice to passengers; given at the starting station, of such suspension, or then given under a custom not to stop at plaintiff's station because handling of freight there was not required, if heard by plaintiff, made it his duty to leave the train, and he could be lawfully ejected at an intermediate station if he remained upon the train in violation of such notice. (Id.)

4. **PAYMENT OF FARE TO BRAKEMAN—BURDEN OF PROOF—WANT OF AUTHORITY—ERROR IN REFUSING INSTRUCTION.**—A brakeman upon a freight-train is not usually authorized to receive payment of fare; and the burden of proof is on the passenger paying fare to him to show that he was authorized to receive it, or that it was paid to the conductor; and in the absence of such proof, and upon proof of the brakeman's want of authority, it was error to refuse an instruction based upon such want of authority. (Id.)

See Negligence, 8-10, 13-25; Streets, Roads, and Highways.

RES JUDICATA. See Execution, 1.

ROBBERY. See Criminal Law, 113-115.

SALE.

1. **SALE OF HAY—PURCHASE BY OWNER OF LAND FROM CROPPER—DELIVERY AND CHANGE OF POSSESSION—ATTACHMENT—SUPPORT OF FINDINGS.**—In an action involving the title to hay sold by a cropper to the owner of the land, and the validity of an attachment against the cropper, where the court found in favor of the plaintiff, and that there was an actual delivery and continuous change of possession prior to the attachment, all conflict in the evidence must be resolved in favor of the action of the trial court, and the findings are sufficiently supported by evidence tending to show that aside from plaintiff's interest in the hay as owner of the land, he in good faith purchased the cropper's interest for full value, and that after the sale the hay was under his exclusive dominion and control by his own agent on the land. (Castle v. Sibley, 648.)
2. **SALE OF STOCK-YARD BY ASSIGNEE OF INSOLVENT—DISPUTE AS TO FIXTURES—COMPROMISE—CONVEYANCE—RECITALS—STEEL RAILS**

SALE (Continued).

NOT INCLUDED.—Where the assignee of an insolvent corporation sold its stock-yard with all buildings, structures, tracks, and appurtenances, and where, upon a dispute as to whether certain articles were “personal property not sold,” or were “fixtures,” a compromise was allowed pursuant to a stipulation referring it to the court, which permitted an admission in the conveyance that all property in and about the premises shall pass as fixtures with the realty; *held*, that a conveyance reciting a sale of “all property used in connection with” the stock-yard company, and an agreement that all “personal property in and about the buildings is to be considered as fixtures,” did not pass sixty tons of steel rails not on the premises, and far removed from any buildings or tracks, of the existence of which the assignee was ignorant, and which were not included in the stipulation referring the dispute, and were listed for taxation by the vendee as “old iron.” (*Alper v. Tormey*, 634.)

3. **SALE OF HAY—ESTIMATED TONNAGE—ACTION FOR EXCESS OF MONEY PAID—BURDEN OF PROOF.**—In an action to recover an alleged excess of money paid for hay sold, under an alleged agreement between the parties to adjust any excess or deficiency of tonnage at a fixed price per ton, paid upon an estimated amount, the burden is upon the plaintiffs to show that under the contract alleged in the complaint there was a deficiency in the estimated quantity paid for. (*Reed v. McDonald*, 458.)
4. **MODE OF MEASURING TONNAGE—ORAL MODIFICATION OF WRITTEN CONTRACT—EXCLUSION OF ORIGINAL.**—Where the plaintiffs relied upon an oral modification of a written contract as to the mode of measuring the tonnage of the hay sold, and had offered the written contract, and had withdrawn it before ruling upon objection of defendant as to variance, such objection cannot be considered; but it was prejudicial error subsequently to exclude the written contract when offered by defendant to show its stipulations as to such mode. In the absence of the original contract the oral modification thereof could not be satisfactorily determined. (*Id.*)
5. **SALE OF PART OF HAY DELIVERED—PARTIES.**—Purchasers from the plaintiffs of part of the hay delivered are not necessary parties to the action to recover the excess of the money alleged to have been paid by plaintiffs to defendant upon his sale to plaintiffs. (*Id.*)
6. **SALE OF ENGINE—BREACH OF WARRANTY—MEASURE OF DAMAGES.**—Where an engine was sold upon warranty of its fitness for use in running machinery, the measure of damages for a breach thereof is the excess of value which it would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it. (*Erie City Iron Works v. Tatum*, 286.)
7. **CONSEQUENTIAL DAMAGES—REASONABLE CONTEMPLATION OF PARTIES.**—Consequential damages are recoverable in such case only in

SALE (Continued).

so far as from the circumstances of the particular case they may be reasonably supposed to have been contemplated by the parties when making the contract as the probable result of a breach. (Id.)

8. **RESALE OF ENGINE UPON WARRANTY—DELAY IN PAYMENT BY PURCHASERS TO SUBVENDEES—COSTS OF SUIT—ATTORNEYS' FEES.**—Where the engine was resold by the purchasers upon a like warranty, the delay of the purchasers to pay for the breach to their subvendees cannot be reasonably supposed to have been contemplated by the parties to the original sale, and the costs of a suit of which the original vendor had no notice, and attorneys' fees paid therein to defend against the rewarranty, are not recoverable against the original vendor upon its warranty. (Id.)
9. **COMPROMISE OF DAMAGES—INTEREST NOT RECOVERABLE ON SUM PAID.**—Where the purchasers compromised the damages with their subvendees, they cannot recover any interest on the principal sum paid against their original vendor, in an action in which breach of its warranty is involved. (Id.)
10. **DEFECTS NOT WAIVED BY RETENTION OF ENGINE—REMEDIES OF PURCHASERS—RESCISSION—ACTION—COUNTERCLAIM.**—Defects in the engine which constituted the breach of warranty were not waived by retention of the engine. The purchasers had the option either to return the engine and rescind the contract, or retain it and sue for damages for the breach, or may counterclaim the damages in an action for the purchase money. (Id.)
11. **CREDIT FOR REPAIRS—FUTURE DAMAGES NOT WAIVED.**—A credit given for repairs by inserting a new governor in the engine, which it was supposed would remedy the defects, but which failed to do so, does not constitute a waiver of future damages, or of expense incurred in the continued use of the engine, for which the original vendor is liable. Such credit was in effect a payment which the vendor was bound to make. (Id.)
12. **DELAY IN PRESENTING CLAIM—EXCLUSIVE RIGHT OF PURCHASERS—ESTOPPEL.**—The delay in presenting the claim for damages for breach of warranty, in addition to the credit for repairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast. (Id.)
13. **UNWARRANTED REFUSAL TO ACCEPT—TENDER.**—Under a written contract for the sale and purchase of five carloads of prunes, to be paid for on delivery, the unwarranted refusal of the purchaser to accept the remainder after receiving the first carload, and the non-acceptance of a written offer to deliver the remainder within the time agreed, was equivalent to an actual production and tender of the property by the vendor. (*Levis v. Royal Packing and Drying Company*, 241.)

SALE (Continued).

14. **ACTION FOR BREACH—LOSS ON RESALE—MEASURE OF DAMAGES—DECREASE IN MARKET VALUE.**—In an action for breach of the contract to buy the remainder of the prunes, where it appears that after the rejection and refusal to accept them, and during the time for delivery, the price declined, and plaintiff promptly resold the prunes, boxed as originally directed by defendant, to other purchasers, at the identical market where delivery was required, such resale was in the line of the plaintiff's duty under section 3811 of the Civil Code, and the measure of damages is the decrease in the market value so ascertained. (Id.)
15. **UNAMBIGUOUS CONTRACT—EXPLANATORY TESTIMONY.**—The contract being unambiguous, there was no error in rejecting testimony explanatory thereof. (Id.)

SCHOOLS.

1. **SCHOOLS LAW—TENURE OF TEACHERS—SPECIAL CITY CERTIFICATES.**—The holders of special city certificates specified in the last sentence of section 1793 of the Political Code are not within the protection of the tenure of office clause provided for in the first part of that section in favor of the holders of city certificates in general. The holder of a special city certificate as teacher of industrial drawing may be dismissed without cause. (Bradley v. Board of Education of the City and County of San Francisco, 212.)
2. **SCHOOL LAW—SAN FRANCISCO CHARTER—POWER OF BOARD OF EDUCATION TO DETERMINE CHARGES AGAINST TEACHER.**—The board of education of the city and county of San Francisco has power to hear and determine charges made in writing by citizens against a teacher employed by the board, notwithstanding the provision in the charter that the superintendent must prefer charges after investigation. The charter is controlled by the general school law in so far as they are inconsistent; but the general power given by the charter to the board of education to investigate charges is in harmony with the school law, and is broad enough to include any charges for which a teacher may be removed. (McKenzie v. Board of Education, 406.)
3. **SUPERINTENDENT A COUNTY OFFICER—DUTIES NOT FIXED BY CHARTER.**—The superintendent of schools of the city and county of San Francisco is a county officer whose duties are prescribed by section 1543 of the Political Code, and the charter of the city and county cannot impose duties upon him as such county officer. (Id.)
4. **MANDAMUS—RESTORATION OF DISMISSED TEACHER—INVESTIGATION OF CHARGES—CASE AFFIRMED.**—A writ of mandate will not lie to compel the restoration of a teacher dismissed upon written charges made by citizens after investigation thereof by the board of education without charges preferred by the county superintendent of

SCHOOLS (Continued).

schools. (The case of *McKensie v. Board of Education, etc. et al.*, ante, p. 406, applied and affirmed.) (*McKenzie v. Board of Education*, 410.)

SLANDER.

1. CHARGE OF MURDER—WORDS ACTIONABLE PER SE—PRESUMPTION OF MALICE.—A complaint alleging that the defendant spoke of and concerning plaintiff in the presence of a person named and divers other persons words importing that defendant has proof that the plaintiff was guilty of the murder of a person named, states words that are actionable *per se*, and if false they are presumed to have been spoken with malice. (*Haub v. Friermuth*, 556.)
2. ALLEGATA AND PROBATA.—The words spoken must be set out in the complaint, that the defendant may have notice of the particular charge which he is required to answer; and the words proved to have been spoken, though they need not correspond with precision to the identical words set forth, must be in substance the same, or have substantially the same meaning, and enough of them must be proved to sustain his cause of action. The *allegata* and *probata* must substantially correspond, and plaintiff is not entitled to recover upon proof of words not set forth, or upon a failure to prove the slanderous words alleged in the complaint. (*Id.*)
3. GRAVAMEN OF CAUSE OF ACTION—FAILURE OF PROOF.—Where, notwithstanding the use of other words in the complaint which are not slanderous *per se*, the gravamen of the cause of action is that defendant had proof that plaintiff was guilty of the murder of the person named, proof that defendant had spoken the other words and that his words did not contain any direct charge of killing or murder, and that he used other expressions not corresponding with the words spoken in the complaint, and not containing such direct charge, is insufficient to authorize a recovery. (*Id.*)
4. WORDS NOT ACTIONABLE PER SE—OPENING LETTER ADDRESSED TO DEFENDANT—CRIME NOT IMPUTED.—A charge by the defendant that the plaintiff had opened a letter addressed to the defendant from his attorney, without stating that it was done without authority and willfully, is not actionable *per se* as imputing a crime. (*Greene v. Murdock*, 136.)
5. COMPLAINT NOT PROVED—NONSUIT.—Where the complaint alleged that the words spoken were understood by those who heard them as imputing a crime, and the answer admitted the words spoken and alleged their truth, but denied all the other allegations of the complaint, and the plaintiff rested with mere proof of the defendant's property, a nonsuit should have been granted. (*Id.*)
6. IMMATERIAL ERROR IN INSTRUCTIONS.—Where, under the pleadings and the evidence, the plaintiff was not entitled to a verdict, he is not prejudiced by erroneous instructions to the jury. (*Id.*)

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE—CONTRACT FOR TRANSFER OF STOCK, BOOKS, AND PAPERS—CONTROL OF MINING CORPORATION—PLEADING—INADEQUATE REMEDY AT LAW.**—In an action for the specific performance of a contract alleged to have been fully performed on plaintiff's part, to transfer a certain number of shares of stock, and to turn over the books, papers, seals, and certificates of a mining corporation, so as to insure to plaintiff the majority of the stock and the control of the corporation, averments in the complaint that the stock, books, papers, etc., have no specific or certain market value, but would be of great value to plaintiff, and that the retention thereof by the defendant and his refusal to perform the contract will work irreparable injury to plaintiff, and that it will be difficult to do justice to plaintiff by an award of pecuniary damages, are sufficient to show that plaintiff has no adequate remedy at law, and a demurrer to the complaint was properly overruled. (*Sherwood v. Wallin*, 532.)
2. **PARTIES—CORPORATION.**—The mining corporation is not a necessary party to such action for specific performance. (*Id.*)
3. **SURRENDER OF NUMBERED CERTIFICATE—ISSUANCE OF NEW SHARES TO DEFENDANT—IDENTITY NOT AFFECTED.**—Where it was agreed that a certain numbered certificate held by the defendant should be surrendered, and the agreed shares issued to plaintiff and the remainder to defendant, and upon surrender thereof the whole number of shares were issued to the defendant, which he retained, and, upon perfecting his appeal, deposited with the clerk, the change in the number of the certificate does not affect the identity of the stock affected by the agreement. (*Id.*)
4. **FORM OF FINDING.**—A finding that defendant has not surrendered the agreed numbered certificate to the secretary of the company, so that a specified number of shares should be issued to the defendant, and the remainder to the plaintiff, is not untrue as to the substantive matter found. (*Id.*)
5. **IMMATERIAL ERROR IN FORM OF JUDGMENT.**—There was no substantial error in the form of the judgment in requiring the original numbered certificate to be surrendered for cancellation, and that the plaintiff receive the specified number of shares thereof, and that the defendant take the remainder. The real thing ordered is the transfer of the specified number of shares to plaintiff, and such transfer would be a sufficient compliance with the judgment to entitle defendant to a satisfaction thereof. (*Id.*)

STATED ACCOUNT. See *Contracts*, 20.

STATUTE OF FRAUDS. See *Contracts*, 28, 45, 48.

STATUTE OF LIMITATIONS.

1. **ACTION UPON NOTE AND ABSOLUTE PROMISES—RULING UPON APPEAL—AMENDED COMPLAINT—CONDITIONAL PROMISES—NEW CAUSE OF**

STATUTE OF LIMITATIONS (Continued).

ACTION.—Where the original complaint declared upon a note and upon absolute promises to pay the same, to take it out of the bar of the statute, and upon a former appeal it was held that evidence of conditional promises did not support the complaint, an amended complaint setting up conditional promises *in haec verba* must be held to state a new cause of action, upon which the statute of limitations runs to the date of its filing, and if then barred, a finding to the contrary cannot be sustained. (Rogers v. Byers, 284.)

2. **PROMISSORY NOTE—INSTALLMENTS.**—Where a promissory note is payable in monthly installments, the statute of limitations begins to run against each installment from the time when an action might have been brought upon it. (Bissell v. Forbes, 606.)
3. **MANDAMUS—REINSTATEMENT OF POLICEMAN DISMISSED.**—An application for a writ of mandate to compel the police commissioners of the city and county of San Francisco to reinstate a patrolman of the police force dismissed by them nearly nine years prior to the application is barred by subdivision 1 of section 338 and section 343 of the Code of Civil Procedure. (Dodge v. Board of Police Commissioners, 608.)
4. **POLICE PENSION FUND—TRUST—CLAIM OF WIDOW—RUNNING OF STATUTE OF LIMITATIONS.**—The police pension fund authorized by the act of March 4, 1889, is not characterized in any of the provisions for its creation or management with the elements of a trust; and the statute of limitations begins to run against the claim of a widow of a deceased police officer from the date of his death, and where she failed for more than five years thereafter to present her claim it is barred by the statute of limitations. (Nichols v. Board of Police Pension Fund Commissioners, 494.)
5. **TIME FOR PRESENTATION OF CLAIM.**—It is not an unreasonable inference from the provision of section 14 of the act that on the last day of June of each year all surplus of said fund exceeding the average amount per year paid out on account thereof during the three years next preceeding should be transferred to and become part of the general fund of the city and county and "no longer under the control of the board or subject to its order," that it was the intention of the legislature that all claims against the fund should be presented within one year after the right to receive such payment had accrued. (Id.)

See Corporations; Estates of Deceased Persons, 13; Findings, 2; Insurance, 5, 6; Pleading, 4, 11; Policeman, 2; Surety, 1.

STREET ASSESSMENTS.

1. **STREET IMPROVEMENT—PRESENTATION OF RESOLUTIONS TO MAYOR—FREEHOLDERS' CHARTER—STATUTE INAPPLICABLE.**—Where the freeholders' charter of a city does not require resolutions to be presented to the mayor, a resolution of intention to improve a street and the resolution ordering the work done under such charter need not be

STREET ASSESSMENTS (Continued).

presented to the mayor for his approval. The act of March 27, 1897, requiring resolutions to be presented to the mayor, has no application to a city working under a freeholders' charter. (*Sacramento Paving Company v. Anderson*, 672.)

2. **ESTIMATE OF STREET WORK UPON VROOMAN ACT.**—The Vrooman Act does not appear to require an estimate of street work before passing the resolution of intention unless the municipal board should be desirous of issuing serial bonds for the work, or to place the work in a district. (*Id.*)
3. **POSTING OF NOTICES—OBJECT AND EXTENT OF REQUIREMENT.**—The object of the statute requiring the street superintendent to post notice of the passage of the resolution of intention "along the line of said contemplated work or improvement" is to give the persons interested a chance to know what is intended, so they can appear and state any objections they may have. It is sufficient that the notices are posted as required along the entire line of the contemplated work; but it is not necessary to post any notice in a block not mentioned in the resolution, upon which no work is to be done and no part of which can be assessed for the work proposed. (*Id.*)
4. **SEPARATE PARTS OF STREET—SINGLE CONTRACT.**—The fact that the work is to be done upon separate parts of the same street, omitting a block therein, does not preclude the letting of the work by a single contract where the work is not of a different character on any part of such street. (*Id.*)
5. **CONSTITUTIONALITY OF VROOMAN ACT—PASSAGE OF CONSTITUTIONAL AMENDMENT.**—The Vrooman Act is constitutional under the amendment of section 19 of article XI, proposed by the legislature in 1883 and properly submitted to the people at the general election in 1884 as constitutional amendment No. 1. The bill proposing that amendment, with its indorsements, shows that it was properly enrolled, authenticated, and deposited with the secretary of state as having been passed by the legislature; and the journal cannot be looked to to rebut or set aside the presumption thus raised that it was properly passed. (*Id.*)

See Judgment, 5.

STREETS, ROADS, AND HIGHWAYS.

1. **STREETS—RIGHT OF ACCESS—CONSTITUTIONAL LAW.**—The right of the owner of land abutting on a city street to access over it to and from his premises is itself a right of property of which, under article I, section 14, of the constitution, he cannot be deprived without compensation. (*Coats v. Atchison, Topeka, and Santa Fe Railway Company*, 441.)
2. **RAILROADS—USE OF STREET—MUNICIPAL CORPORATIONS—MEASURE OF DAMAGES.**—A railroad company, although it may have a license from the municipal authorities to use a street for its railroad

STREETS, ROADS, AND HIGHWAYS (Continued).

purposes, is liable to an abutting landowner for injuries inflicted on him by such use in being deprived of access over the street to and from his premises; and in an action by the landowner to recover for the injuries so inflicted the measure of damages is the amount, which will compensate him for all the detriment proximately caused by such use. (Id.)

3. **ABATEMENT OF NUISANCE—DEMAND.**—Under section 3483 of the Civil Code the abutting landowner may maintain an action against the railroad to recover the damages sustained by him in being deprived of access to his premises without making a demand on the railroad for the abatement of the nuisance causing the damages. (Id.)

See Eminent Domain, 3-13; Nuisance, 4-9.

SUBROGATION. See Insurance, 7.

SUMMONS. See Mortgage, 2-4; Unlawful Detainer, 1.

SURETY.

1. **JOINT NOTE—PAYMENT BY SURETY—OBLIGATION EXTINGUISHED—REMEDY AGAINST PRINCIPAL—STATUTE OF LIMITATIONS.**—In this state one who signs a joint note as co-maker, but designating himself as surety, and who pays the note, thereby extinguishes its obligation, and his sole remedy against the principal maker is upon the implied obligation of the principal to reimburse him, which is barred in two years after such payment. (*Crystal v. Hutton*, 251.)
2. **IMPROPER ACTION UPON NOTE—ASSIGNMENT BY HOLDER—PLEADING—OWNERSHIP—CONCLUSION OF LAW—DEMURRER.**—The surety in such case cannot maintain an action upon the note by taking an assignment thereof from the holder after its extinguishment by payment; and a complaint by the surety on the note setting forth the facts shows on its face that the note is *functus officio*. The averment of ownership of the note is of a conclusion of law, and a demurrer to the complaint was properly sustained. (Id.)

SWAMP AND OVERFLOWED LANDS.

1. **STATE SWAMP LANDS—CONTEST OF RIGHT TO PURCHASE—INTERVENTION BY SETTLER.**—Upon a contest of the right to purchase state swamp land, one not a party to the action, who was for a year previous to the time of his application to purchase a settler on the land, which he claims to be fit for cultivation, might intervene before judgment, under the provisions of section 387 of the Code of Civil Procedure, but not after judgment. (*Smith v. Roberts*, 148.)
2. **MOTION TO SET ASIDE JUDGMENT FOR INTERVENTION—CONSTRUCTION OF CODE.**—Under section 473 of the Code of Civil Procedure only a party to the action or his legal representative can move to set aside a judgment taken against him through his mistake, inad-

SWAMP AND OVERFLOWED LANDS (Continued).

vertence, surprise, or excusable neglect; and that section does not authorize a motion thereunder by one who failed to intervene before judgment to obtain the right of intervention after judgment to test his right to the land in controversy. (Id.)

3. **NEGLECT OF SETTLER—KNOWLEDGE OF ADVERSE CLAIMS.**—Where it appears that before the commencement of the action the settler knew that there were other claimants of the land, and had been notified by the surveyor-general of the reference to their claims for contest, it was his duty to look after his rights by intervention pending the action. (Id.)

TAXATION. See Estates of Deceased Persons, 7; Mortgage, 5; Municipal Corporations, 6, 7.

TORT. See Conversion, 4.

TRUST.

1. **ACTION TO ENFORCE TRUST IN LAND—VENUE—INCIDENTAL ACCOUNTING.**—An action having as its sole object to establish and enforce a trust in land, in which an accounting asked is merely incidental to the action and which necessarily involves the determination of the amount due from plaintiff under the contract recognizing the trust, to be paid as a condition of relief, is a local action, to be tried where the land is situated; and the prayer for such accounting does not entitle the defendants to a change of the place of trial to the place of their residence. (Hannah v. Cauty, 225.)
2. **ACTION TO ENFORCE TRUST—JUDGMENT PROTECTING MORTGAGEE—AFFIRMANCE UPON APPEAL.**—Where land was conveyed to one defendant in trust for the benefit of plaintiff and another defendant, and in the judgment rendered in an action to enforce the trust the holder of a mortgage which was executed by the trustee with the consent of all parties interested is fully protected, and has no right to complain of the judgment, it will be affirmed upon appeal taken by such holder therefrom. (Hentig v. Williams, 454.)
3. **ERROR IN JUDGMENT—FRAUDULENT SATISFACTION OF JUDGMENT—LIEN UPON TRUST LAND—REINSTATEMENT IN EQUITY—MORTGAGE BY TRUSTEE FOR REDEMPTION.**—Where there was a judgment-lien upon the trust land which bound plaintiff's interest, and satisfaction was fraudulently entered by the defendant beneficiary without payment in fact, and the lien was reinstated in equity in suit against the trustee, who borrowed money upon mortgage to redeem from the lien, the judgment in equity against the trustee is binding upon the plaintiff beneficiary, and the money raised and paid by the trustee was expended for the common benefit of both beneficiaries; and it was error not to hold the interest of plaintiff subject to the reimbursement of half the sum expended by the trustee, with interest, to be paid for the use and benefit of such mortgagee. (Id.)

See Pleading, 11.

UNLAWFUL DETAINER.

1. **SERVICE OF SUMMONS BY PUBLICATION—PREMATURE JUDGMENT BY DEFAULT.**—In an action of unlawful detainer, where the service is made by publication of summons on the ground that defendant is concealing himself to avoid personal service, the service is not made until the publication is completed, and the defendant is allowed two full days thereafter in which to appear and answer. The entry of a judgment by default on the second day thereafter is premature and will be reversed upon appeal. (*Quigley v. Ellenwood*, 626.)
2. **ACTION AND DUTY OF PLAINTIFF.**—In taking a judgment by default the plaintiff acts at his peril. He must see that the law has been complied with, and that the time for appearance has expired. (*Id.*)
3. **TERMINATION OF LEASE—PLEADING—NOTICE NOT REQUIRED.**—In an action for unlawful detainer of real property wrongfully detained by a lessee after the expiration of the terms of the lease, without consent of the lessors, the complaint need not allege either a three days' notice to quit or a thirty days' notice to terminate the lease. (*Craig v. Gray*, 598.)
4. **SUPPORT OF FINDINGS AND JUDGMENT—IMMATERIAL OMISSION TO FIND.**—Where the findings made are sustained by the evidence and support a judgment rendered in favor of two of the plaintiffs, the failure to find upon an issue as to the title of a third plaintiff, in whose favor no title was proved, is immaterial, as a proper finding upon such issue against such title could not change the judgment rendered. (*Id.*)
5. **EXECUTORS' SALE OF LEASED PROPERTY—INEFFECTUAL APPEAL FROM CONFIRMATION—DEMURRER TO ANSWER.**—Where the complaint in unlawful detainer states a cause of action in favor of plaintiffs as purchasers of the leased property at executors' sale confirmed to them, an answer not denying its averments, and merely pleading a sale to the defendant and a pending appeal by defendant from the order of confirmation to plaintiffs which it shows to be ineffectual for failure to file the undertaking in time, states no defense, and a demurrer thereto was improperly overruled. (*Buhman v. Nickels & Brown Bros.*, 266.)
6. **TERMINATION OF TENANCY—NOTICE—STIPULATION IN LEASE.**—Where the lease expressly stipulated that in case of sale of the leased premises the lessee would quit and surrender the said premises upon thirty days' written notice, when the notice stipulated was given the defendant could not prevent the lease from lapsing, and no further notice of three days was required to sustain an action for unlawful detainer. (*Id.*)
7. **REHEARING—AMENDMENT OF MISTAKE IN ANSWER—EFFECTIVENESS OF APPEAL—POINT NOT URGED ON HEARING—PROTECTION OF RESPONDENT.**—A rehearing will not be granted to allow respondent to amend the record by showing a mistake in the preparation of the answer as to the effectiveness of the appeal therein pleaded

UNLAWFUL DETAINER (Continued).

from the order confirming the sale to plaintiffs, where no such point was made or suggested on the hearing, and no notice was taken by respondent of appellants' argument upon the ineffectiveness of the appeal, and where such amendment would involve an amendment of the answer of which respondent may avail himself in the trial court. The ruling adhered to by this court will not prevent the respondent from taking every advantage which his appeal may in fact give him. (Id.)

8. LEASE WITH PRIVILEGE OF PURCHASE—EQUITABLE DEFENSE—FRAUDULENT CONVEYANCE BY LESSOR.—A lease making the lessee a preferred purchaser in case of sale contemplates a *bona fide* sale, and not a fraudulent one; and in an action for unlawful detainer brought by grantees of the lessor the defendant may set up as an equitable defense that the sale to such grantees was collusive and fraudulent for a fictitious price, with the intent to deprive the defendant of his rights under the lease and to oust him from the premises, after the lessor had refused his request to place a cash price thereupon so that he could purchase the same, which he was able and willing to do. (Ogle v. Hubbel, 357.)
9. RIGHT TO AFFIRMATIVE RELIEF NOT ESSENTIAL.—It is not essential to the equitable defense that the defendant should show any right to affirmative relief, or that the contract in the lease should be an enforceable contract for the sale of land. (Id.)
10. ATTORNMENT TO FRAUDULENT GRANTEES NOT REQUIRED—REFUSAL TO PAY RENT—FINDINGS.—The lessee having been deprived by a pretended sale of the important privilege to purchase the land, which the lease gave him, he could not attorn to the fraudulent grantees without recognizing the validity of their purchase and their right to terminate the lease and deprive him of the balance of his term; and where the court found upon sufficient evidence that the deed was made for the fraudulent purpose shown, it was not necessary to find that defendant has refused to pay the rent to the plaintiffs. (Id.)
11. EVIDENCE—ABILITY AND WILLINGNESS TO PURCHASE—OFFER TO PAY RENT TO LESSOR—FINANCIAL CONDITION OF GRANTEES.—Under the issues it was competent for defendant to show ability and willingness to purchase the property at its fair market value. Evidence that he offered to pay the rent to the lessor, who is not a party, and that the lessor refused to accept it was not prejudicial. It was permissible to prove the financial condition of one of the grantees as bearing upon the issues, and to contradict his testimony. (Id.)
12. EJECTMENT AGAINST TENANT AT WILL—TERMINATION OF TENANCY—NOTICE TO QUIT—REFUSAL TO SURRENDER POSSESSION.—A complaint alleging plaintiff's ownership and right of possession of the premises described, that a tenancy at will of the defendant had been determined by notice, and that defendant after three days from the notice to quit refused to quit the premises, and still

UNLAWFUL DETAINER (Continued).

occupies the same, and stating the rental value of the premises, and praying for restitution thereof, for treble damages, and for costs, states a cause of action in ejectment and for relief which may be granted in such action; and it is immaterial in the absence of any ambiguity or uncertainty that the facts stated may also show a cause of action in unlawful detainer. (*Hayden v. Collins*, 259.)

13. **ISSUES AS TO TITLE—FINDINGS AND JUDGMENT—UNTENABLE OBJECTION.**—Where defendant took issue upon plaintiff's ownership and right of possession and set up title in himself, the issues were properly involved and tried in the action of ejectment; and where findings and judgment thereupon were in favor of plaintiff, the objection of defendant that title could not be tried or found in an action of unlawful detainer must be deemed inapplicable. (*Id.*)
14. **DEED FROM PLAINTIFF TO DEFENDANT—DELIVERY ESSENTIAL TO TITLE—INSUFFICIENT ESCROW—TESTAMENTARY DISPOSITION.**—Conceding that a deed from plaintiff to defendant was sufficient in form, it did not pass title where there was no delivery with that intent. A delivery in escrow was not sufficient where it was not irrevocable, and the deed was not intended to take effect until after her death, and was in fact revoked by her, and when last seen was found in her possession. The law does not allow a testamentary disposition by deed. (*Id.*)
15. **AGREEMENT TO DEVISE PROPERTY—INSUFFICIENT PROOF.**—An agreement to devise property from plaintiff to the defendant must be established by clear and convincing evidence; and where the evidence is vague and unsatisfactory as to the terms of any agreement, and does not show a meeting of minds on any definite proposition, and shows that everything was dependent upon the plaintiff's will, and that defendant did not perform the expected services, equity cannot protect the defendant in possession by enforcing an agreement to devise. (*Id.*)
16. **POSSESSION BY PERMISSION—TENANCY AT WILL.**—Where the defendant entered into the possession of the property of plaintiff by her permission, without valid agreement or transfer of title, he became a tenant at will of the plaintiff. (*Id.*)
17. **MOTIVES OR DESIRES OF GUARDIAN—CONVERSATIONS INADMISSIBLE.**—The motives of the guardian and what he believed and desired were immaterial; and conversations between the guardian and the defendant and his wife were inadmissible, where it appears that the guardian had never talked with his ward about the matter in controversy, and knew nothing concerning it. (*Id.*)

VENDOR AND VENDEE.

1. **VENDOR AND PURCHASER—CONTRACT FOR PERFECT TITLE—AGREEMENT FOR BUILDING RESTRICTIONS—ENCUMBRANCES—PERSONAL COVENANT—ENFORCEMENT IN EQUITY.**—Under a contract for the

VENDOR AND VENDEE (Continued).

sale of land calling for a perfect title, a recorded agreement imposing building restrictions upon the land shows an encumbrance upon the title, and even if the covenant be a personal one, though assuming to bind all representatives, yet being such as a court of equity might enforce against purchasers with notice, the purchaser was justified in declining to accept the title. (*Whelan v. Rossiter*, 701.)

2. TITLE TO BE DEDUCIBLE OF RECORD—RIGHTS OF PURCHASER.—Under a contract for a perfect title, the purchaser is entitled to one which is fairly deducible of record, free from all reasonable doubt and exposure to litigation; and he is not required to make investigation as to facts *alunde* that may affect the title, not disclosed by the abstract, furnished by the vendor, or actually known to the purchaser. (*Id.*)

VENUE. See Place of Trial; Trust, 1.

WAREHOUSEMEN.

1. CORPORATION — PARTNERSHIP — AGENCY — WAREHOUSE RECEIPTS BY SECRETARY TO HIMSELF — RATIFICATION — FINDINGS AGAINST EVIDENCE.—Where a corporation owning a warehouse is virtually an incorporated partnership, of which its secretary is the managing partner, and he has been in the habit of storing hay in the warehouse and issuing receipts therefor in his own name, signed by the corporation, by himself as secretary, which were regularly entered upon the books and known to the directors, he had authority to issue such receipts to himself; and where it clearly appears that a particular receipt so issued was ratified by the company upon report thereof, and by failure to object thereto upon inquiry of a subsequent assignee thereof for value as to the rate of storage, findings that the corporation did not issue or ratify the receipt are against the evidence. (*Riley v. Loma Vista Ranch Company*, 488.)
2. WAREHOUSE RECEIPT CONCLUSIVE AS TO AMOUNT STORED — ESTOPPEL.—Both under the general law and by force of the statute law of this state it is not competent for a warehouseman to contradict his receipt as to the amount stored; but he is estopped thereby to deny the actual receipt and possession of the goods represented by said receipt. (*Id.*)

WATER AND WATER-RIGHTS.

1. FLOODING OF LAND — DESTRUCTION OF CROPS — INTERFERENCE WITH DRAINAGE SYSTEM — LIABILITY OF RIPARIAN OWNERS.—Where an owner of land, by an established system of drainage to the ocean, has rendered his land tillable, riparian owners who, by the subsequent erection of dams, have interfered with such drainage system, and caused back-water to rise on such land, to the destruction of

WATER AND WATER-RIGHTS (Continued).

crops growing thereon, are liable for the resulting damage. (Thomas v. Bolsa Land Company, 335.)

2. **ACTION FOR DAMAGES—JOINDER OF PLAINTIFFS—LAND TILLED UPON SHARES.**—The owner of the land and one who is engaged in tilling it upon shares, each being interested in the crop destroyed, were properly jointed as co-plaintiffs in the action for damages therefor. (Id.)

See Negligence, 1-7; Nuisance, 1-3.

WAY. See Easement.

WILLS.

1. **BEQUEST OF BOOKS AND PAPERS—BANK-BOOKS EXCLUDED.**—Where a testator leaves among his effects a large number of law and other ordinary books, a bequest of "all my books and papers" will not be construed to include bank-books or the moneys on deposit represented thereby, especially where such an interpretation would render of no effect other provisions of the will. (Estate of Jeffreys, 524.)
2. **CONSTRUCTION OF—DESIRE AND DIRECTION FOR LEASE.**—A provision in a will expressing a "desire" that a son named "shall have the use and occupation, rents, issues, and profits of my fruit ranch," described, for the period of five years from the death of the testator, together with all household and kitchen furniture and personal property used in connection therewith, at a specified annual rental, to be paid in equal shares to his brothers and sisters, and a "direction" to all other children to execute to said son immediately after his death "a lease of said premises and personal property for the said term and upon the conditions herein expressed," shows a clear intention that such son shall have the use of the property described for the period of five years. (Estate of Buhrmeister, 80.)
3. **DEVISE OF ESTATE—SUBJECTION TO LEASE—DISTRIBUTION.**—Where the testator devised all of his estate in equal shares to six children, including such lease, in a previous article of the will, such devise is not without limitation, but is subject to the lease for five years subsequently provided for in favor of one of them as against the others and the property was properly distributed subject to the provision for the lease. (Id.)

See Estates of Deceased Persons.

WITNESS. See Contempt.

